IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 97-03522-CA

DIVISION: CV-H

ANGELA B. WIDDICK, as Personal Representative of the Estate of ROLAND E. MADDOX, deceased,

Plaintiff,

vs.

BROWN & WILLIAMSON TOBACCO CORPORATION, a foreign corporation; LIGGETT GROUP, INC., a foreign corporation; and WINN-DIXIE STORES, INC., a Florida corporation,

Defendants.

PROCEEDINGS held before The Honorable Charles O. Mitchell, Jr., at the Duval County Courthouse, 330 East Bay Street, Jacksonville, Florida, on Monday, May 18, 1998.

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P R O C E E D I N G S

May 18, 1998 8:30 a.m.

(Present for this hearing in chambers are:

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Floyd Matthews, Stephanie J. Hartley, Norwood S. Wilner, Dean L. Jarmel, John Nyhan, Thomas E. Riley, Edwin B. Browning, Robert B. Parrish, and Jacqueline Terry.)

MR. MATTHEWS: The first thing we have got is the issue of Tucker's deposition.

THE COURT: I have read the part that you intend to present, Mr. Matthews, and I have read your motions in limine and the attachments to it.

MR. JARMEL: We do have a supplemental submission, Your Honor.

THE COURT: Okay.

MR. JARMEL: And I'll also hand up this case. This is the case, Judge.

(The Court reviews the document)

THE COURT: Are these the same portions that were attached to your motion in limine?

MR. JARMEL: No, Your Honor. These are supplemental, and if I may be heard briefly on the motion, I'll explain what I have submitted.

Attached to our supplemental memorandum, Judge, is the deposition testimony of Dr. Tucker's

treating physician, Dr. Williams. This was taken in the same case, the Middleton case. The counsel for plaintiff that Mr. Wilner referred to on Friday, Mr. Venable, participated in that deposition.

The case I have handed up this morning,

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Your Honor, is the Kaelin case, 410 So.2d 1355. It's a Fourth D.C.A case from 1982. And the Kaelin case establishes the standard by which competency must be assessed in this instance. And I quote from the Kaelin case at 1357:

"The question is whether or not the witness is capable of giving a correct account of the matters which the witness has seen or heard relative to the question at issue."

The Fourth D.C.A. went on to observe that, "the witness must be able to give a reasonable and accurate account."

Now under the standard, Judge, it is clear that Dr. Tucker's testimony, given about things that happened 40 years ago, is incompetent. Dr. Blair, his treating neurologist, has provided a statement, which was attached as Exhibit A to our original motion in limine, in which he states that Dr. Tucker had a history of strokes starting from the 1980s. "These strokes resulted in cognitive impairment

which made Tucker's recollection of past events unreliable." Those were his words.

Dr. Williams' affidavit, which was also attached as Exhibit B to our motion in limine, attests that Dr. Tucker's strokes have caused cognitive impairment and have, quote, "caused significant problems with his short- and long-term memory," end quote.

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He notes that Dr. Tucker has -- engages in confabulation, which I had to figure out what that meant over the weekend. And what it means is that, essentially, Dr. Tucker will on a conscious or even unconscious basis make things up to fill in blanks that are missing in his memory loss. That results in Dr. Tucker's testimony being unreliable under the legal standard.

In addition, Dr. Williams, in the deposition transcript I have handed you, has testified that Dr. Tucker's strokes have impaired his cognitive function and his long-term memory. He has testified that his brain has shrunk as a result of several strokes and that these strokes have all contributed to his memory loss. He testified about Dr. Tucker's tendency to confabulate.

Based on this record, this factual record,

there is no dispute about five things: Number one, that Dr. Tucker has suffered two major strokes and several mini strokes since the 1980s; second, that the strokes have impaired his cognitive function; third, that it has impaired both his short-term and, more importantly, his long-term memory; and fourth, that he has a tendency to confabulate, making his testimony unreliable.

All of which makes the fifth point that based on this factual record under the Kaelin

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standard and other case law in Florida that Tucker's testimony is unreliable and should be excluded.

There is going to be and has been no contrary showing on this, Judge. They have known about this issue prior to trial. This deposition of Dr. Williams was taken in the same case with Mr. Venable attending. We filed a motion in limine well before trial. If plaintiffs have a showing to make on the factual issues raised by our motion in limine, they should have done so or they should do so right now. They have had opportunity to cross-examine Dr. Williams had they wanted to.

Mr. Williams performance on Friday, in which he offered a self-serving account of incompetent opinion testimony that Dr. Tucker looked

fine and looked fine to him is clearly inadmissible and incompetent to provide an opinion on the essential question of whether Dr. Tucker was in fact competent.

They cannot and will not challenge that Dr. Tucker suffered several strokes, that this impaired his cognitive state, that it affected his memory loss, and that he has a tendency to confabulate. Those facts are what the motion is based on. And there will be no contrary showing on those facts.

Instead Mr. Wilner came in and said, tried to make it sound like we were up to something no

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good, that we didn't like it. "As soon as it went bad, he started singing like a canary," were Mr. Wilner's words. And that's what Mr. Wilner was relying on Friday. I don't know if we're going to hear something different today, but you can't do that. You can't just come in and say, well, we have the wrong intent in challenging Dr. Tucker's competence and rely on Woody's personal observations, which are obviously -- and I don't mean this in a personally pejorative sense, but they are self-serving and incompetent under evidentiary standard.

There has got to be a factual counter showing to rebut what we have said. We have two affidavits and a deposition of Dr. Tucker's treating physicians, including his neurologist, which established cognitive impairment and long-term memory loss and confabulation. That is sufficient under Kaelin and under the controlling Florida precedent to establish that Dr. Tucker was unreliable, an elderly man testifying about things that happened 40 years ago. We need to see a factual showing or Brown & Williamson's motion should be granted, Judge.

THE COURT: Well, can you point to any part of the deposition where you know he made it up; that you can show that the facts are different than

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what he said? I mean, I don't have a problem with what you have just said as far as it goes, but in reading it, it doesn't seem much different from any other deposition by someone that age who is trying to remember facts 40, 50 years ago.

Now, Dr. Schepers is a little bit different because his memory has been buoyed by the fact that he goes around the country testifying 50 times a year on that or more and -- but...

MR. MATTHEWS: I believe he has also had a

stroke, Judge.

THE COURT: I would think that Dr. Tucker has had his deposition taken in more than one instance, too. And I guess the only thing that bothers me or concerns me about your argument is if it is so unreliable, show me some of his answers that you know to be inaccurate. I mean, I read the designated portions that the plaintiff intends to read, and I'm not saying that some of it wouldn't be inadmissible on other grounds, but overall I didn't get that sense at all of the same person that you are arguing is incompetent.

MR. JARMEL: But I can tell --

THE COURT: And so if you could show me certain portions of the deposition, and maybe not even the portions they've designated. There were some portions that -- in your original motion where he seemed to be confused, but they are not reading

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that part. And I can tell you now if you ask me about something that happened 40 years ago, I would be a little confused myself. So he doesn't seem to be so confused to me that the testimony is unreliable.

If you could show me several instances where you know it to be unreliable that you can back

it up with other information that's reliable and show that he absolutely made it up, then I don't think you would have a problem with me at all.

MR. JARMEL: All right. I didn't come prepared to do that this morning, though, Judge. What I can tell you is that having read it, I do have a recollection that there are many things in there that are inaccurate and where they're just missing -- where it is incomplete, where his testimony -- I mean, they're asking about things that happened 40 years ago, and he is giving these vague, strange answers. Now, to a person who had memory, an accurate memory of what happened, they would be providing answers. So unfortunately, Judge, I can't give you a specific instance sitting right here, and I can prepare to do that later, because I know that this happened, that he gave --

THE COURT: Well, you are talking about a meeting that took place in 1953, and as I've read, I was more and more impressed with his memory, if you

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will, because there -- apparently, it seemed to be a large number of people there, and he seemed to know who they were and for the most part what their positions were at other cigarette manufactures. And he got a couple of them wrong, and was corrected at

the deposition. Quite frankly I was amazed that he could do that.

Now, if you can show me that all of that was fabrication or most of it was fabrication and those people weren't in those positions at that time -- I think, you know, he knew who the members of the committee were. The plaintiffs' attorneys, I guess it was Mr. Venable at that time, kept saying -- trying to get him to say that the advertising company was a member of the committee, and he just flatly refused to say that. They asked him that 15 times in 15 different ways, and he didn't answer.

I mean, that's what concerns me. In reading the deposition, I don't see much difference in any other witness given that period of time. And in the asbestos cases, you know, it is the same way. We have some people who come in and testify who were there. I forget the guy's name, or the one at Corning, but he comes in and testifies, and he can't remember half of what Dr. Schepers remembers. But just some people's memories are better than others.

But from the standpoint if you can show me -- I mean, he seems to be able to answer the

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questions is what I am getting at, and if you can show me that he is answering them wrong without any

compunction to get it right, then, you know, then I would certainly look at that more closely.

MR. MATTHEWS: Judge, could we ask this, and I understand the Court's feeling about that, and that was part of my argument, that we would like to read this deposition as quickly as we can, and we've been -- it feels like, it seems like we have been delayed and delayed in that regard, and if they have some evidence, then I would like them to have it to the Court at least by noon today. They ought to know whether it's internally consistent.

THE COURT: Can you do that?

MR. JARMEL: We can surely try.

THE COURT: All right. And that does not mean if I allow his testimony that all of the questions and answers that he gave would be admissible, so I'm not --

MR. MATTHEWS: I understand.

THE COURT: But, obviously, I'm leaning towards that, barring a strong showing.

Now, I have no problem with what you said. And I don't doubt that someone his age has lost some of his ability to remember things, but he says that and, you know, he says I don't remember on occasion in the deposition. And just reading it

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and, of course, I wasn't there and I'm not relying on Mr. Wilner's testimony the other day that he appeared to be all right. From his deposition, he appeared to be all right.

Now, obviously, the doctors don't think so, I mean, you know -- and I have to weigh that but...

MR. PARRISH: Judge, I was at the deposition of Mr. Tucker, Dr. Tucker, and I have had an opportunity this morning to read --

MR. MATTHEWS: I was, too, Judge. So if we're going to --

MR. PARRISH: Well, you weren't at the first session.

MR. MATTHEWS: I was at the last session.

THE COURT: Well, you all talk to me. You can talk to each other outside.

MR. PARRISH: May it please the Court?

THE COURT: All right.

MR. PARRISH: I had an opportunity to read Woody's testimony Friday, and I was shocked by it. I was personally disgusted by what went forth at that deposition. Clearly Dr. Tucker was able to recite names of some people because it had been gone over with him, but in my personal opinion -- and I

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don't know what that's worth to the Court. I'm not a doctor, but I have deposed probably 5- or 600 witnesses in my life. This gentleman was clearly there some of the time, a little small portion of the time, and clearly not there other times.

THE COURT: Well, excuse me for interrupting you but I didn't, Mr. Parrish, I didn't read the entire deposition. I took it home with me with the idea that I would, but I never got to that point, so I am only talking about the designated areas. Now, there may be other portions of the deposition where he clearly didn't know what he was talking about.

MR. PARRISH: It's the old situation of a cold record, and I know you're familiar with that term. I think perhaps I can go back and look at it and maybe we can -- my memory at this age is enough that I can explicate for you from portions of the cold record. But I just wanted to make a record here for whatever it is worth that in my view this gentleman was not -- his cognitive abilities were clearly impaired.

And I'm not a doctor. I didn't know the technical word until I read the deposition of the doctor, but confabulation is perfect. He is a nice,

nice guy. He was trying to give answers, and he

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gave some answers which I think are --

THE COURT: I'm not unfamiliar with that type of response, people who want to be helpful and say too much so...

MR. PARRISH: That's what I thought.

MR. JARMEL: And also, Judge, I mean the testimony -- I mean the statements and the deposition testimony also show that Dr. Tucker can't answer, and it's -- I think that's obvious from the transcript that you've read, can't deal with long complex questions. And so it's not merely an answer, do you remember Bill Jones who was at the meeting, but what was the policy or what were the results of some complicated ten-year policy, okay. And his answers are kind of vague -- now, someone who had -- hadn't experienced strokes, who had their cognitive abilities, might be able to clearly articulate in response to a complex and lengthy answer about a very important and complicated subject matter, an answer that gives a reliable response to a difficult question.

And I think it is obvious from Dr. Tucker's transcript that he couldn't do that, and his answers bespeak that, and that is why

plaintiffs like it so much, Judge. That's exactly the point. I mean, let's put the cards on the table. It's precisely because he was not able to handle the tough questions well, because of his

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impairment, that this is being proffered.

THE COURT: Well, I'm not saying that I would not exclude some of the questions and answers. I have said that. But, for instance, I am concerned that they would not have the right to ask him what kind of -- if he was the head of the research department, what kind of research was going on back then. And he seemed to be fairly clear about that. In other words, if you can show me that there was all kinds of research going on and he said there was none, then I would be a lot more impressed.

But I think, you know, he is your client's former employee, and who are they going to go to and ask those questions. So we are stuck with the fact that we're dealing with events that happened 40 years ago and in some cases 50 years ago, and I am not unaware that the science in this area, as in most areas, is not exact, and it was evolving over a period of time, and I think that one of the plaintiffs' problems in proving any type of case

would be to show how it evolved and what the manufacturer -- what your client knew or should have known at various times. And, obviously, you have all spent a lot of time on that particular area.

And if his testimony is reliable as to what type of research they conducted or didn't

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conduct, who was at the meeting -- he, you know, apparently, got a couple of the job descriptions of various people who were there. I mean, I doubt that I could do any better than he did in that case.

On the other hand, you know, if it's truly unreliable, I don't want them to use it.

MR. MATTHEWS: Well, Judge, and I think that's the ruling. And if they can show us by noon, then we can take that up, but I think that's what we ought to do because we're -- they're unhappy with the deposition, and those are the facts of the matter. They set it. They're unhappy with it.

THE COURT: It doesn't matter whether you're ecstatic with it and they're totally unhappy with it.

MR. MATTHEWS: Right. I understand that.

THE COURT: You know, I have to determine it on a different basis.

MR. JARMEL: And, Judge, obviously the

only thing I can do is rely on his treating physicians, who says in a document, and it's unrebutted, that he has cognitive impairment, that he has significant long-term memory loss, and that he does confabulate.

I can look -- I can go back now to the transcript and try to show particular instances. It is very difficult to do that. I'll try to do the best I can. But we do take the position on the

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whole that we have made our showing as to his unreliability based on it, and this is an unrebutted showing. They knew that this was an issue. They had an opportunity to cross-examine Dr. Williams, so we believe that the record does establish the basis for a finding of unreliability as to his whole testimony. But we will go back, we'll come back from the lunch hour, and we'll try to point out specific instances where we think there is a problem.

THE COURT: And if you could, if you would relate it, if you can, to the portions that they have designated, because I did read -- I started reading the deposition, and there were places where he didn't seem to know what was happening. But, I mean, the part that they have designated doesn't

seem to be those portions. Now...

MR. JARMEL: Well, obviously, our position, Judge, is when he is -- if you see that he is disoriented and having problems giving answers as a whole, I think it infects his whole testimony.

THE COURT: Well, perhaps, but what I'm concerned with is if he is making answers up and it is as bad as the doctor says it could be, and then you should not have any real problem in showing me that some of his answers are just totally wrong.

MR. JARMEL: Right. That will be the easy

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part. The hard part will be the memory loss issue where he is not able to provide a full account of important matters. And it is hard for me to, in a short period of time, prove the negative, that --

THE COURT: Obviously, I realize that there are going to be questions that he can't answer from his memory. I wouldn't expect him to be able to.

(Mr. Wilner entered Judge's chambers.)

MR. MATTHEWS: Judge, I think that is all we have got at this point.

(Discussion off record)

(The hearing in chambers concluded at 8:45 a.m.)

(Change of reporters, 8:45 a.m.)

Monday, May 18, 1998 9:00 a.m.

P R O C E E D I N G S

MR. BACKER: All rise, please. This court is once again in session. Please be seated.

THE COURT: Good morning. Ready to proceed, Mr. Wilner?

MR. WILNER: Yes, Your Honor.

THE COURT: Mr. Nyhan?

MR. NYHAN: Yes, Your Honor, we are.

THE COURT: Bring them in, please, Mr. Backer.

(Jury enters courtroom)

THE COURT: Good morning, ladies and

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gentlemen.

THE JURORS: Good morning.

THE COURT: Call your next witness, please, Mr. Wilner.

MR. WILNER: Your Honor, the Maddox family calls Dr. Richard Pollay as our next witness. I believe he's in the courtroom.

THE COURT: Dr. Pollay, if you'd just come up and have a seat in the witness stand, I'll swear you once you're seated, sir. Good morning.

DR. POLLAY: Good morning.

THE COURT: Have a seat please and raise your right hand. Do you swear that the testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do, so help me God.

THE COURT: Thank you, sir.

RICHARD POLLAY, Ph.D.,

having been produced and first duly sworn as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. WILNER:

Q May it please the Court. Good morning, Dr. Pollay. You are here from where?

A From Vancouver, British Columbia, University of British Columbia.

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Q We thank you for coming all this way.
Tell us what you do at the University of British Columbia.
A I'm a professor of marketing and advertising in the school of business there.
Q And what faculty appointments do you hold?
A I'm in the faculty of commerce, the official designation for our school of business, at the University of British Columbia and an adjunct

faculty member in the institute for health promotion.
Q Are you a tenured professor there?
A I am. I'm a full professor. I'm been there for some time now.
Q And have you over your professional career taken a special interest in the cigarette industry and cigarette advertising?
A Yes. Since 1987, I've been working almost exclusively on the topic of cigarette advertising and related marketing activities like packaging, public relations, and things of that nature.
Q Give us a brief sketch of the kind of things that you've done in connection to your special interest in cigarette advertising.
A I've done a lot of work of a historical nature, looking at the archival materials that exist for some of these organizations, looking at what was said about the organizations in the old magazines,

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like the advertising magazines, and the tobacco journals and things of nature. Done some contemporary studies of the impact of cigarette advertising on children versus adults, looked at public relations activities, done some studies on retail activity, billboards, and sort of a wide

range of marketing activities.

Q Have you published in the scholarly literature?

A Yes, I have, extensively.

Q I have your CV in front of me. It's about 32 pages worth. Can you estimate the number of publications that bear your -- that you're the author of?

A No, I don't know the total, but I do know that there's now roughly 100 papers with respect to cigarettes and its marketing. Not all of those are published in peer review journals. Some of those are working papers that have been produced within my own offices, which is called the history of advertising archives.

Q Are you familiar with the reports of the Surgeon General of the United States?

A I am.

Q And have you been asked to do research for the Surgeon General on sections which concern cigarette advertising?

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A I have on several occasions.

Q Tell us about those.

A I drafted material for the very large report that was published in 1994 about children,

and I've also drafted materials with respect to the targeting of ethnic audiences, which was just recently published a couple weeks ago. And there's material I provided on the topic of targeting of women. And that's in process. That is yet to be published.

Q Now, the 1994 report, is that a section in the official report of the Surgeon General of the United States, 1994?

A Yes, there's a chapter, I believe it's Chapter 5 which concerns advertising and marketing. And the bulk of that chapter was material that I had drafted and information that I had gathered from my research that they used.

Q And, of course, when you draft this, is it subject to the approval of the Surgeon General's committee who is in charge of the final report?

A The approval, the final edit, the verification of all of the quotes and references and all the data is all very carefully reviewed.

Q And the -- and you mentioned something about a recent Surgeon General's report. That would be the 1988 Surgeon General's report?

A I actually haven't seen the copy myself,

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so I'm not sure how it's identified, but I did see a press release a couple weeks ago that indicates that it was now in circulation. So I assume it's identified as the 1998 report.

Q The chapter of the 1994 Surgeon General's report that you provided materials for is called Chapter 5, Tobacco Advertising and Promotional Activities?

A That's correct.

Q And are -- and within that did you consider the role of advertising and promotion in the marketing of tobacco products?

A I did.

Q And the history of cigarette advertising to the young?

A Yes. That section was of particular interest to me because of my historical work.

Q Did you consider the historical content -- did you do what's called a content analysis of cigarette advertising?

A I did. And in that section I reported not only my own research but similar work that had been done by other people.

Q And did you also consider the effects of advertising on the public?

A Yes, and I reviewed not only some of the

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scholarly conclusions about that but also the conclusions that were coming from the trade, that is from the advertising and tobacco people themselves, particularly in the historical periods.

Q You follow -- although you're living in Canada, do you follow the situation in the United States?

A People in Canada will tell you that I follow the situation in the United States and ignore the situation in Canada. Yes, I follow it on a daily basis.

Q Were you trained -- did you go to under-graduate and graduate school in the United States?

A I did. I was born in Connecticut and went to undergraduate school in New York State and then did my graduate degrees at the University of Chicago.

Q Did you give a keynote address in 1996 called the Tricks of the Tobacco Trade?

A I've given an address under that title and similar titles a large number of times to various organizations and conferences.

Q Did you give a lecture to the Vancouver Institute in 1997 called A Pack of Lies, The Truth About Cigarette Advertising?

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A Yes, I did.

Q Have your articles that you've written, have they appeared in journals that have been circulated to other professionals in the field?

A Yes, they have. In the most recent one I can think of was the paper called The Last Straw, which was about with the targeting of kids and the impact upon children. And it was in a very large circulation magazine called the Journal of Marketing.

Q You said that you had contributed material to the Surgeon General's reports. Do those reports cite you as an author of much of this material?

A Well, my work is cited in the reference list.

Q That's what I mean.

A And in the front of the Surgeon General's report, I would be listed as one of the contributing authors. I don't think they identify paragraph by paragraph who drafted what.

Q Do other scholastic or do other papers that you've written on cigarette advertising appear as citations in the Surgeon General's report?

A Yes, they do.

Q And have you tried to explore -- well,

that wasn't the right word. Have you tried to get a collection of cigarette advertisements over the

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years that you feel is representative or important for your -- for what kinds of things you're interested in?

A Yes. One of my activities has been to assemble what we call the TIPS collection, tobacco industry promotion series. The initials there spell TIPS. That's part of the history of advertising archives, and that's documents and example advertisements of cigarette advertising from the turn of the century. And we now have several thousands of examples.

Q Before we discuss specific advertising, let me ask you a few questions just about advertising in general, if I could. With the footnote or the preface that we all live in a world of advertising, what is the importance, if you can answer -- if not I'll try again, because it's kind of a philosophical question.

What does advertising do to consumer -- consumers, and in particular consumer expectation, about what a product is like? And if that's too broad of a question, talk specifically about cigarettes.

A Well, I think I can answer the question in general.

MR. RILEY: Your Honor, may we approach?

(Side-bar conference held outside the hearing of the jury)

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MR. RILEY: Judge, that question is so broad I don't know how to -- I mean I think.

THE COURT: I think you need to be more specific. You're basically saying tell us all you know about cigarettes and advertising.

MR. WILNER: It's kind of a leading question.

THE COURT: Right.

MR. WILNER: That's fine. If it's to form, I'll rephrase it. No problem.

MR. RILEY: Thank you, Judge.

(Side-bar conference concluded; proceedings resumed before the jury)

BY MR. WILNER:

Q Dr. Pollay, I was asked to rephrase that question because it wasn't a very good question, so let me try again.

Does -- this may seem like a silly question, so I'm going to ask you more. Does advertising affect consumer expectation of what a

product is like?

A Yes, it does.

Q Does that mean that we believe everything we see on advertising?

A No, not -- it works more on an attitude of shaping perceptions and attitudes and to some extent beliefs where there's factual information being

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presented.

Q Does advertising in some way define the kind of realities that we -- or what we perceive is real?

A Well, it shapes how we perceive similar products and how we think that people will perceive us if we're seen using those products.

Q And not to be too abstract about this, but what is -- if you see a product like at the grocery store, sometimes it will have a thing on it that says "As seen on TV." Now, the product is right in front of us. What is -- how does an advertising and marketing professional interpret that concept and how is it related to what I asked you before?

A Well, that kind of claim is used to enhance the credibility of the product. The average consumer believes that if the advertiser is willing to put money behind their product in an advertising

campaign, that that shows their faith in the product. And so the fact that something has been advertised on TV makes it more credible as a product.

Q And is in some ways or to many people the television world almost more real than the world in front of them?

A Well, I can't say that for certain, but it's certainly something that we spend a lot of time attending to, and we can get emotionally involved in

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various things we see on television just as if it were real.

Q How -- and, again, before we look at some individual ads and I'll ask you to comment on how -- on what effect they might have had on consumer expectations -- have you done also a survey of how much advertising of cigarettes there was in the past and up to today?

A Yes, I have. I've done a lot of research that documents the volume of advertising.

Q And, in addition, have you looked at or have you been active in research on some of the internal documents from the cigarette industry that have spoken to their promotional efforts?

A I have. I've taken every opportunity I've

had, whether through cases like this or through occasionally papers that may exist in libraries.

Q And do you recognize the name Hill and Knowlton?

A Yes, I do.

Q And I'm going to ask -- I'm not going to ask you about those right this minute, but just tell us who Hill and Knowlton -- who was Hill and Knowlton?

A Hill and Knowlton is a public relations firm, and for many years the nation's largest.

Q And did Hill and Knowlton have a contract

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with the members of the cigarette industry in the 1950s and '60s?

A Yes, they did. In the early '60s.

Q And was Hill and Knowlton run by a man named John Hill?

A Yes, it was. He was one of the founding partners.

Q And did he donate his papers, his memoirs, so to speak, to an institute in Wisconsin with instructions that they be preserved?

A Yes, he did.

Q And were the terms of the preservation that they were to remain sealed as to the clients

for 25 years after he donated them?

A I forget whether it was specified as 25 years, but I do know that they were sealed until something like 1989.

Q And who was there to see them opened?

A I was the first one to look at the tobacco papers, at least.

Q And were you there actually when the box was opened on the anniversary when it was first made public?

A I was there, I think, 48 hours after the official opening date, but I was the first one to see these particular papers.

Q All right. Well, I'll ask you about those in a little bit, but first let's talk about

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advertising, and not just advertising, but its effect on consumer expectation, if any, and its effect on consumer expectation about the safety or usability of the product.

So without going into unnecessary detail, how long have cigarettes been advertised?

A There's been some forms of advertising since the 19th century, but the styles of advertising we're used to, that is national-based campaigns, really date from around the first world

war. The first big one was an R. J. Reynolds Camel campaign that just slightly predates the first world war.

Q And was there extensive advertising of Lucky Strike in the years after the first world war?

A Yes, there was.

Q Who was the man in charge of the Lucky campaign after World War I?

A I forget the date when he took charge, but the man most famous for this period was George Washington Hill was reputedly quite the character in addition to having this responsibility.

Q Is he any relation to John Hill?

A Not to my knowledge.

Q Just a common name?

A Yes.

Q And George Hill, who was he? Who was

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George Hill?

A He was the executive in American Tobacco Company who had the responsibility for Lucky Strike advertising.

Q And the years that we're talking about are basically?

A The '20s and '30s, early '40s.

Q Why is this important or why would you

know about George Hill and the American Tobacco Company and Lucky Strikes in the '20s and '30s?

A Well, there's been a fair amount written about him, and he was quite outspoken and often quoted in the trade press in that period. So his name comes up quite frequently when you're doing historical research.

Q Was that the most intensively advertised cigarette product of that era?

A I forget whether it had the biggest budget, but it was certainly one of a very short list of intensively advertised brands of cigarettes.

Q And what was the significance or what -- how did the type of advertising done by George Hill in the '20s and '30s affect the way people perceived cigarettes in that time?

A Well, it had been -- his particular advertising was very successful. Among various successes he claimed was the success of attracting women to become smokers in the 1920s. His campaign

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was one of the most explicit ones.

MR. RILEY: Your Honor, may we be heard?

(Side-bar conference held outside the hearing of the jury)

MR. RILEY: Your Honor, I suspect that

this issue is going to come up from time to time in the course of this testimony. I wanted to alert you that he's now getting into issues, targeting of women, for example, which really have no bearing with respect to Mr. Maddox. And I think the only purpose of this testimony can be to prejudice the jury.

I don't think it has anything to do with this case. It's not relevant to anything. And I want to raise that objection. I want to also alert Your Honor to the extent -- I don't know whether Mr. Wilner plans to do this or not, but the same issue may come up with other groups. And for that reason I object to that as well. I don't think that's appropriate in this case.

MR. WILNER: What did he say?

THE COURT: He said with other groups.

MR. WILNER: With other groups. I don't understand the objection. Is he objecting to an answer? And, if so, what part? I don't understand.

MR. RILEY: I'm objecting to testimony in this case with respect to the effect that

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advertising had the effect of inducing women to smoke cigarettes, for example. I don't think it's got anything to do with this case, Judge. And can

only serve to prejudice the jury.

THE COURT: I think if you're talking about the history of advertising of cigarettes, you know, we're not -- I won't let him go into talking about to a large extent advertising directed at children and stuff like that, but we're talking about Mr. Maddox apparently smoking cigarettes when he's 18 or 19 years old.

MR. WILNER: Sure. May I be heard? We're not only talking about Mr. Maddox, we're talking about consumer expectation which is one issue in the strict liability.

THE COURT: I'm going to overrule the objection, but I don't want you to go a lot into targeting certain areas, okay?

MR. WILNER: Let me just say --

THE COURT: That's what they do in advertisement, I understand that.

MR. WILNER: Well, I know. And they do it and we think it's a negligent act to do that. And I intend to present testimony that they did target groups who couldn't defend themselves, but the ads speak for themselves on that.

THE COURT: You could certainly if Mr. Maddox saw the ads directed at women, he would

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think if it's okay for women, then it must be all right for a rugged man like me. So I'm overruling the objection at this point.

MR. RILEY: Thank you, Judge.

(Side-bar conference concluded; proceedings resumed before the jury)

BY MR. WILNER:

Q Where was I? You had an answer.

THE COURT: You asked him about Mr. Hill.

MR. WILNER: I asked you about Mr. Hill. What was the importance of Mr. Hill? And you had given an answer and then I lost my train of thought with the objection.

Would you give that answer again so I can get back on track.

A Well, I had begun my answer by making reference to the campaigns that had attracted women to smoking in the late '20s and early '30s. I think the other thing he was even better known for was the use of the "Hit Parade" radio program which he began in 1935, if I remember correctly.

Q Okay. Let me show you an ad from 1931. Is this the kind of thing you're talking about?

A Yes. And it was characteristic of many of these ads from the '30s and even through the '40s

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that they made quite explicit references to various issues like irritation of throat as this one does.

THE COURT: Mr. Wilner, I don't mean to interrupt you, but is that in evidence already?

MR. WILNER: Yes, Your Honor, that's in evidence. I'm sorry that I didn't indicate that.

THE COURT: What book is it in?

MR. WILNER: These are -- all the ads are going to be coming out of the book that has been marked as No. 7.

THE COURT: Plaintiff No. 1, all right. Thank you.

MR. WILNER: And let me get the evidence -- do you have the evidence copy, Ginny, with you?

MS. STEIGER: No.

MR. WILNER: Excuse me, Your Honor, let me get the evidence copy.

THE COURT: Okay, that will be fine.

Q Were there ads that suggested that smoking could keep you thin?

A Yes. In fact, that was the cornerstone of this campaign that attracted women, that suggested at first to reach for a Lucky instead of a sweet. To smoke instead of eating candy. And then once that idea was established, the slogan became "Future

events cast their shadow" and they showed, as this

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illustration does, quite overweight shadow behind a slim younger woman. I think the shadow meant to foretell the destiny if you ate sweets.

MR. RILEY: Can we get the date on that, Your Honor?

MR. WILNER: 1930. Does it show it on the bottom here, Ginny? 1930.

Q The ad also says "It's toasted, your throat protection against irritation and against" -- what?

A Cough.

Q Cough, right. Against cough. Were those typical of the ads of the times?

A Those kind of slogans were used as part of the advertising repeatedly for a couple of decades.

Q Now, of course, this is an old ad. This is from 1930. These ad campaigns from the '30s, are you saying they had any effect in the '50s and '60s and '70s? I mean, the fact that this stuff went on all the way back then, this ancient stuff.

A Well, I believe they do because the attitudes of the people who were growing up in the '20s or '30s or '40s get shaped and the die is cast. And so their perceptions of smoking in

general and perceptions of the various brands would have been strongly influenced by what they saw as young children.

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Q And let me show you another ad. If you could zoom that out just a little -- no, the other way. Can you see the wording up here, "I'm your best friend, I'm your Lucky Strike."

A Yes, I can.

Q Was that typical of the advertising of the day -- let me ask you this. What is your comment as an advertising professional on this business "I'm your best friend"?

A Well, I think that captures the loyalty and feelings that people have toward their cigarettes as they become habituated and users, that the act of smoking is a reliable source of some satisfaction, although short-lived.

Q And what was the effect of getting women to be cigarette smokers also on overall consumer expectation?

A Well, George Washington Hill said it was like opening a gold mine in his front yard.

Q And when women joined the smoking force, did that have an effect of overall consumer -- did that increase or did that change consumer

expectation or affect consumer expectation in some way as to how acceptable this practice and product was?

A It greatly increased the number of people who were smoking, so that then the next generation growing up saw that many more adults smoking. So it

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became all that much more commonplace. And there was a lot more smoking in those days than there is today, for example.

Q Why does it matter whether people see other people smoking in terms of what they believe are the hazards involved?

A Well, it conveys social approval. If lots and lots of people are doing it, youngsters come to the conclusion that I guess it can't be all that risky.

Q And as to the ad that we saw just immediately before about the -- it's toasted and the irritation business, was that ever the subject of a ruling by the Federal Trade Commission?

A Yes, it was. They charged it in 1942 with false and misleading advertising.

Q What was the disposition of that?

A Slow. There wasn't a decision until 1951, but they were found guilty.

Q Who was found guilty?

A The American Tobacco Company.

(Change of reporters, 9:30 a.m.)

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throats, though they do use the term mildest, which I think that has that meaning without being quite so explicit.

Q Well, was the effect of showing a person engaged in this kind of an activity out enjoying themselves with a Lucky Strike cigarette in terms of what consumers may reasonably be expected to perceive about the safety of the product?

A Well, I think the intent and the effect of this ad is to display and encourage an attitude.

MR. RILEY: May we be heard?

(Side-bar conference held)

MR. RILEY: My objection is that he's

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called -- he asked what the effect of the ad was and

the doctor started talking about the intent of the ad.

THE COURT: I agree. I think he can talk about the effect, but I don't think he, you know, knows about the intent. There may not be any difference in your mind, Mr. Wilner.

MR. WILNER: I think that's a figure of speech, advertising uses that. I think in advertising, intent is a term of art. It doesn't mean the personal intent of the parties.

MR. RILEY: That's not the way it sounds.

THE COURT: If you want to explain that to the jury first and then have him testify, that may allow it. But otherwise you're saying, you know, what they intended with the ad versus what they accomplished.

He can testify as to, you know, how that may have been received. But what they had intended -- and it's probably the same thing, but I don't -- I don't think that he can testify with authority what they intended unless you're talking --

MR. WILNER: I'll lay the predicate then, okay.

(Side-bar conference concluded)

Q Dr. Pollay, in your explanation of what the

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likely effect of this is, you were talking about what the intent was.

Now, understanding that you did not ever talk directly with any of the people who were at the advertising agency or inside of American Tobacco, is what is -- is "advertising intent" a term, a professional term that you use?

A Well, I meant by that what seems to me to be the thrust of the advertising copy and layout; that is, the focal message of what they're trying to establish and get across.

Q Okay. So using the word -- what the thrust is rather than trying to get into somebody's particular mental state at any time, continue with your explanation of what -- of what, if any, effect this has on consumers about the safety of the product.

A Okay. The thrust of this is to display and encourage an attitude of carefreeness; that is, this "Be happy, go Lucky." It's all right, there's no reason to be anxious. I think that's the real intent. I shouldn't use that word. That's the real message.

We would call it the copy platform premise. That's written large in the headline and

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then the use of the person at their leisure engaged in a sporting activity helps to underscore this carefree notion and convey an idea that smoking is part and parcel of a recreational lifestyle that involves sporting activities.

Q Now, this approach to basically the "Be happy, go Lucky" in one way or the other, was this followed for years and years or decades and decades by American Tobacco and by the rest of the cigarette industry?

A The industry changed quite a bit in the 1950s, changing their tactics away from these explicit health claims about doctors and throat irritation towards the use of pictures of health, showing people engaged in recreational and athletic behaviors, using sports endorsements and the like. So implying health rather than direct and explicit health claims of a verbal nature.

Q Let me see if you can identify who this gentleman is.

A I can, because I grew up in the Boston area. That's Ted Williams, who is the star of the Boston Red Sox, the last baseball player to hit 400.

Q And I'll represent to you that this says 1954 on the bottom, but along the side it has some

indications of Ted Williams, I don't know if that's -- I guess it is, fishing and enjoying himself

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outside.

Is that what was happening to the advertising in the 1950s?

A Yes, it was. In fact, those were probably taken here in Florida, because he retired over in the Tampa area.

Q So let's -- following this theme, who is this gentleman in l962?

A This is Frank Gifford, who endorsed Lucky cigarettes. This is shortly after his phenomenal success as a collegiate football player and pro football player before he got into being an announcer and other things for which he's now well-known.

Q And the, the effect on consumer expectation of safety of having a sports figure endorse the product is what?

A That if it's good enough for a sports figure, who has obviously got a lot of reasons, including financial, to be concerned with their health, that it ought to be safe enough for me.

Q Now, here is another ad from 1961. All these are from our evidence book, Exhibit 7. This doesn't have an identified person. In other words,

it just has a model.

What is -- is this still another subtle change in these ads?

A Well, the model is obviously a lifeguard. So he's a person with athletic skills. In fact,

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other people's lives depend on his ability to execute those athletic swimming skills when needed. So it still conveys this athletesism and association with cigarettes.

Q Now, what this -- are these kinds of ads typical of what consumers, typical consumers would see in the media during the 1960, '70s, and '80s?

A Yes, I think most of the modern period -- we wouldn't see as the -- the named celebrities in the '70s and '80s. But we would see pictures of health. And we would have seen ads which increasingly relied on the visuals that has created an image for the brand by the use of the power of the picture rather than making a lot of verbal claims about the product.

Q One second. What happened to Frank Gifford? Oh, I've got it. I want to go back to Frank Gifford because I forgot something.

What is this? Can you read that?

A Yes. The taste to start with.

Q What does that mean?

A That beginning smokers should consider using Lucky Strike as their first brand.

Q Who are beginning smokers?

A Overwhelmingly, minors.

MR. RILEY: Your Honor, can we be heard at side bar.

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(Side-bar conference held)

MR. RILEY: Judge, this is getting into the area where Mr. Wilner is talking about using targeting and so forth. This is at that point in time when Mr. Maddox is certainly a grown adult, 32 years old at this point in time, I think, when this ad was run.

I think the only purpose of this can be to, to prejudice the jury. It's got no relevance in the case to this testimony. He's already got the ad in to describe the effect of the ad on consumer expectations. There's no reason to go any further with this advertisement, Your Honor.

MR. WILNER: Your Honor, we are going to be here all day. But first of all, it is in evidence. He's entitled to explain it.

Number two, it shows a pattern of practice. And then we will go back in time and show that they

did the same thing when Mr. Maddox was a child.

Number two, it shows their intent to offer their products to people who couldn't make the decision whether they were safe or not, which goes to punitive damages in the case. So it's all related.

THE COURT: I'll allow it over the objection.

(Side-bar conference concluded)

MR. WILNER: Put that back on, Ginny, I'm sorry.

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Q I'm sorry. I lost my train of thought again. The taste to start with, I almost missed it the first time. What does it mean?

A It means that beginning smokers should consider using Lucky Strike as their brand of initiation because they will then enjoy it and stay with it.

Q Have you studied the consumption -- of the way that advertising relates to typical consumption of cigarette products?

A Yes.

Q I mean, do people who start with a product, or at least use it in their early years, not necessarily their very first but, you know, before they're in their mid-20s, just in their early years,

is that often or usually known as the product that they'll use as a cigarette, that they'll use for years and years?

A That's true to some extent generally. But it's very true for cigarettes, that brand loyalty patterns get established among the young and then become very hard to break among older people.

Q The, now, what is called the demographics or who uses cigarettes, is that something you're also familiar with because --

A I am.

Q And who, who -- how old are the typical

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starters into the -- now, and then I'll ask you earlier. But how old are people when they start smoking, in general, in the U.S.?

A They're underage, they're minors. I think the most recent figure I've seen is something like 90 percent of starters do so as minors.

Q And was that the case in the 19- -- late '40s and '50s, when Mr. Maddox was starting to smoke as well?

A It's my understanding it was the case, although it has gotten worse in the modern era; that is, the age of starting has gotten younger and younger in more recent years. So we now even see

starting among nine year olds, ten year olds.

Q Now, you have a print, help me find it, I believe, one of the Lucky Strike ads that says, like, Why wait, do you remember that?

A I don't recall that.

Q We'll get back to that. I think it has something to do with the taste to start with, why wait. But if you can't remember, we will go on.

A Yes, I don't recall that.

Q Who is this man? Just show the picture not any of the text.

A This is Frank Sinatra.

Q And did he endorse Lucky Strike?

A He appeared on that "Hit Parade" radio program I mentioned. And I'm sure there, like

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everywhere, caused the teenage girls in particular to swoon and scream and was the first celebrity to have that effect on his audience.

Q Now, tell me where you got this picture?

A I got that from a publication called "Sold American," which was put out by the American Tobacco Company.

Q Do you have it with you?

A Yes, I do. In fact, this is a copy that includes Paul Hahn's business card, Paul Hahn being

the CEO of American Tobacco Company.

Q Where did you --

A President was his title then.

Q Where did you get that book?

A I bought this in a bookstore in Manhattan.

Q And it was written or it's published by the American Tobacco Company when?

A Published by American Tobacco Company in 1954.

Q Okay. And is that, is that picture on a page in the book?

A Yes, it is.

Q It's page 86?

A Yes.

Q All right. What does it say under there when it talks about Frank Sinatra?

A The early career of Frank Sinatra included

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appearances on the Lucky Strike "Hit Parade" first as a new kind of performer. Sinatra was soon dubbed a teensation.

Q A teensation?

A Yes. That's in quotation marks because it's not a word found in a dictionary, although I think we all know what they mean.

Q Teensation, kind of like a contraction of

teen sensation?

A Yes, a sensation among teenagers.

Q When I think of Frank Sinatra, though, I think of, you know, he just passed away. He's older, I don't think of teen.

A Well, this is in the 1940s. He was a much younger man in the 1940s.

Q That's how it works, huh?

A His style of crooning and this whole "Hit Parade" show, of course, was of particular interest to the very young then, as now it's the very young that take an interest in what is hot and what is not in popular music.

(Change of reporter, 10:00 a.m.)

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Q So there was a show called "Hit Parade." And what did that have to do with cigarettes?
A It was sponsored exclusively by Lucky Strike.
Q Was there also a cigarette called "Hit Parade" cigarette?
A There was in the 1950's. When filters were launched, Lucky Strike had entered the filter market. Was called the "Hit Parade" brand.
Q In the 1950's was this a television show?
A It was for a few years in the early 1950's. I think it ceased about 1955.
Q Do you have any video clips of that?
A I wish I did, but I don't.
Q But anyway, what this says is Frank Sinatra was on the American Tobacco "Hit Parade"?
A That's correct.
Q And were there television ads for Lucky Strike cigarettes on the "Hit Parade"?
A Yes. Yes. And only Lucky Strike cigarettes. They were the exclusive sponsor.
Q Who was watching the "Hit Parade"?
A Teenagers. Maybe not only teenagers, but a lot of teenagers.
Q Something about crooning. Now, that isn't a word I have used lately. What is crooning?

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A Well, it refers to a style of singing that's romantic in nature. Largely singing ballards as opposed to uptempo numbers.
Q Was there audience reaction to the crooning of Frank Sinatra?
A The teenage girls would scream and faint just as they did for The Beetles in the '60s in my generation.
Q All right. Do you have -- have you compiled a -- some television clips from the 1950's to illustrate the subjects that we have been talking about?
A Yes, I have.
Q All right. Now I think we have two separate tapes. And I am a little confused.
THE COURT: I am going to ask the jury step back in the jury room for just a minute while you set that up.
MR. WILNER: Thank you, Your Honor.

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THE COURT: Just step back in the jury room for about no more than five minutes. Would you approach the side bar just a minute.
(Sidebar, Court and counsel)
(Jury exits courtroom; discussion off record and recess)
THE COURT: Mr. Wilner, let me know when you

are ready to proceed.
MR. WILNER: I will be just a second, Your Honor.
THE COURT: Mr. Riley, are you ready to proceed?
MR. RILEY: Yes, Your Honor.
THE COURT: All right. Bring them in, please.
(Jury enters courtroom)
THE COURT: All right, Mr. Wilner.
MR. WILNER: May it please the Court.
Q Dr. Pollay, have you compiled some video clips to illustrate what the advertising was like and as it influenced consumer behavior in the 1950's and '60s.
A Yes, I have.
Q And these are, I think -- the first clip I think is a Lucky Strike cigarette ad?
A Yes, I believe it is.
Q I think we have two tapes, and we have got the right one. Dr. Pollay, as we show these, if you -- or will these help the jury in understanding what you have been testifying to about how public opinion was affected by advertising?
A Yes, they will.
Q All right. Let's play it, and then I may

stop one and ask you a question in the middle.
(Videotape played in open court)
"Be happy, Go Lucky, Be Happy, Go Lucky, Be Happy, Go Lucky, Go Lucky Strikes Today.
"Tonight Lucky Strike presents, your 'Hit Parade.' Light up a Lucky, it's light up time. Be happy, Go Lucky, it's light up time. For the taste that you like, light up a Lucky Strike. Relax, it's light up time."
MR. WILNER: Hold that one second.
(Videotape stopped)
Q All right. We did have the "Hit Parade," I guess.
A We have just an ad excerpt. We don't have the whole program, although that woman who did the jingle there, Dorothy Collins, also did the singing in the show.
MR. RILEY: Your Honor, there is no question pending.
THE COURT: All right. Please --
Q Who is the woman who did the singing?
A Her name is Dorothy Collins.
Q Who was that?

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A She was a featured singer on the show and then did the jingles here and elsewhere for Lucky

Strike.

Q Was it common to integrate the commercial into the show itself?

A Yes. In fact, many times it was so tightly integrated it's very difficult to pull them out when you have the tapes.

Q Did they have the stars of the show actually lighting up the cigarettes on camera and going into the commercial?

A Yes, they often did.

Q The next thing looked like a Newport ad, and let me just ask you, is a consumer's expectation about a -- about the safety of a product only formed from the advertisements about that one brand of cigarette?

A No. It's shaped to some extent by all of the cigarette advertising they would see. In other words, that is not only their own brand but the advertising for other brands of cigarettes.

Q And I am going to ask you how much people have been exposed to all their lives, people who are alive today or the people who lived in the last decades, but first let's go ahead with this tape.

(Videotape played in open court)

"A Hit, A Hit, 'Hit Parade.' Go fresh, because you know it's fresh. Just start smoking, they

are fresh tasting. So keep your pleasure fresh, Keep smoking Newport, is the cigarette.

"I am here to tell a story, and here is a hint. All about a cigarette with refreshing mint. And mint in tobacco is sure to please. Use your taste, A special blend, It has a southern breeze. Are there any questions, man?

"So keep your pleasure fresh, Keep smoking Newport cigarettes, Newport filtered cigarettes, Newport filtered cigarettes."

MR. WILNER: All right. Let's hold that a second.

(Videotape stopped)

Q What's the message?

A Well, I think there are several things there. What strikes me is the use of the jingle and the setting in the soda shop, where soda shop being a venue that the average teenager can easily relate to.

Q And there was some reference -- they had an older lady there too who was kind of --

A Yeah, I'd have to watch it again to really pick up on what that was about. It's also interesting to me, it's got a rap music style. Saying the words instead of really singing all of the words.

MR. WILNER: Let's go on to the next one.

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(Videotape played in open court)
"Hold onto your hat, and come on with us to the most fun we have ever had on wheels. The dune buggy. By that I mean my wife Maxine and me, Frank Gifford, here on California's giant dunes. Watch us. It's so fun. I sure hope you get a chance to try it sometime.
"Here is something else you ought to try, and soon. Lucky Strike. Why? Because if you like taste in your cigarette, you will get it with Luckies. This is all the taste a smoker could want. It's rich and smooth. The taste of fine tobacco.
"And let me tell you, once you start getting that taste, you will want to keep getting it. So come on, get that fine tobacco taste. Get Lucky, the taste to start with, the taste to stay with. Get Lucky Strike."
MR. WILNER: All right. Hold that for a second.
(Videotape stopped)
Q This looked just like the print ad.
A Well, it is. It's the video version of that same print ad, including the same slogans and I think almost identical topography. Certainly Frank Gifford is used in both places.

Q And the message to consumers is what?
A Well, that it's good enough for professional athletes. It obviously can't be all that hazardous.
Q Let's go on.
"Lucy.
"Yes, Dear.
"Give me a cigarette, will you?
"Don't say 'cigarette,' say 'Phillip Morris.'"
MR. WILNER: Let's stop this for a second.
(Videotape stopped)
Q I know who these people are, but tell us anyway.
A Lucille Ball and Desi Arnaz, husband and wife comedy team. At this point in time Desi Arnaz had been a band leader before this show. This was the most popular show of the period, 1950's, and probably still sets a record because it commanded almost every television audience in the nation, although there were fewer television sets than there are now.
Q Well, and as we will see in a minute, the reason I stopped is Lucy and Desi are the stars of the show, right?
A Right. We see them both in cartoon version and then in life.

Q What is the message behind using Lucy and Desi who appear as the stars to also then go right into the commercial and start smoking?
A Well, that celebrities, people who are rich

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and famous choose these brands, and they are presumably knowledgeable and smart people. And, again, if it's good enough for them, it ought to be good enough for the average person.

Q Now, we have all seen so many advertisements today, and maybe we are all be a little jaded. Do you go back to these ads to study them to see how some of these techniques evolved?

A Yes, and to see how the advertising styles change over some time.

Q Okay. Let's go on.

(Videotape played in open court)

"For you. Nothing but the best for Mr. Riccardo.

"Thank you. Lucy, you are so good to me.

"You see how easy it is to keep a man happy? Why not give your husband a carton of Phillip Morris cigarettes.

"Smart move. They will love them. The mildness, the smoothness, and the wonderful good taste. And he'll love you too for thinking of him.

"That's right, everybody. And don't forget. Call for Phillip Morris.

"Call for Phillip Morris."

(End of videotape commercial)

"Play ball. Brooklyn Dodger baseball, brought to you by the makers of Lucky Strike, the cigarette that's made better to taste better.

"Be Happy, Go Lucky. Go Lucky Strike today."

MR. WILNER: Now, let's stop this for a second.

(Videotape stopped)

Q Now, is this -- is this a sponsorship of the baseball game?

A Of the television coverage of the baseball game. Yes, it was.

Q And running with it is an ad that has a cartoon baseball sequence?

A Yes.

Q And the message there is what?

A Well, it's that sports and cigarettes can go hand-in-hand. I think that's one of the reasons for the advertising of the sporting event. And they were a leading advertiser of baseball.

MR. WILNER: All right. Let's go ahead.

(Videotape played in open court)

MR. WILNER: All right. Let's stop that.

Q Was that the end of that?

A Well, I think so. In some previous edit something may have been cut off.

Q It sort of seems a little amusing and light-hearted. Did those kinds of ads come into play in the '50s and '60s also?

A Well, this is -- that billboard the baseball went into said, "Be happy, Go Lucky," so that was the

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intention is to portray and convey this kind of light-hearted attitude.

Q All right. Let's go on. I guess this is the same one.

(Videotape played in open court)

"Doolah, doolah, doolay, Luckies taste better. They are fresh and smoother, toolah, toolah, toolah. Luckies taste better. They are fresh and smoother. Lucky Strikes. Lucky Strikes. Doolah, doolah, doolah. Doolah, doolah, doolah."

A That's, I think, just a repeat.

"Newport, Newport, Newport is the cigarette."

Q Have we seen this one?

A Yeah, we have.

MR. WILNER: Can you cue it forward?

(Videotape played in open court)

Q Guess it's hard to edit these things sometimes.

A That may be the end of it.

Q Okay. We have another few minutes we are going to play, but I will ask you a couple of questions in the meantime. Those -- oh, here is what I wanted to ask. Television became a force in the -- in the American household -- or television was introduced into the American household when?

A In the postwar period. It's really not until 1950 that you begin to get any substantial audience and national networks taking shape, although there were television broadcasts for Lucky Strike cigarettes as early as 1947.

Q Now, have you compiled a list of television programs that were sponsored by different tobacco companies at different -- and when they occurred in a typical evening viewing?

A Yes, I had access to substantial data of that nature for 1963.

Q All right. And would the data from '63 be representative, although not exactly the same, from year to year?

A It would certainly be representative of that period. And by "that period" I would say the '60s

generally. I mean, the industry leaves television in the '70s, so it wouldn't be representative after 1970.

Q All right. We will get to that in a minute. But just to follow through on that, after 1970 you say the cigarette advertising leaves the television media?

A Yeah, television and radio.

Q Okay. Let's go back to a period in the middle, so to speak, of the television coverage of cigarette advertising. And you have previously given me a list which has American Tobacco and some other tobacco companies, and some of the shows that they sponsored, correct?

A Yes, that's correct.

Q Okay. And you have prepared this for ease of

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explaining this to the jury, correct?
A It had been previously prepared as a technical report I had worked on, and this was reported in the Surgeon General's report of 1994, but I thought the appendices here would be helpful.
Q So let's see if we can see what this is. Over here we have a list of programs.
MR. WILNER: Now let's go up to the top, Ginny.
Q This is American Tobacco as of 1963, and what is this? Like one snapshot in a week or something?

A Yes, this is the prime time television sponsorship activity for America. And then similar pages in this report would report similar scope of data for the other five major firms in the industry.
Q All right. So just taking this one from the top, we have got -- these are sponsorships of these shows, correct?
A These are the shows they were buying advertising time on, and then the networks on which the shows were carried, the day of the week, and then the prime time slot, as it's called.
Q All right. So, for instance, "Gun Smoke" aired on CBS Saturday nights from 10 to 10:30?
A Right. And then the next line shows "Gun Smoke" again for the 10:30 to 11 time slot, because the audiences may shift a bit during the hour.
Q It was an hour show, but some of the kids went to bed at 10:30, I guess?
A Well, the data was provided in half-hour blocks.
Q Okay. And would this mean that there was at least one advertisement for an American Tobacco cigarette during this time period?
A Yes.
Q Now moving over, we see estimated total

audience in millions?
A In millions, that's correct.
Q So the total audience that they estimated was 23 million people, whenever that first came on?
A Yes.
Q And teens were 1,871,000, right?
A 871,000, yes.
Q Now the children -- how do you define a child?
A Preteens. I believe that's younger than 12 in this data set.
Q And they were 3,042,000, right?
A And these are the calculations of what percentage of the total audience were teens and children.
Q So, actually, the top number which was "Twilight Zone" had a lot of children watching it, didn't it?
A Yes, about 30 percent of the audience would

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have been underage, that is teenagers or younger.
Q All right. Now what is this one here? I just noticed this is like 45 percent.
A Oh, we have to go back to --
Q Go back over here.
A "Combat."

Q "Combat." Okay. And in something called "The Greatest Show On Earth"?
A That was about a circus.
Q All right. And then "Jimmy Dean." Who is Jimmy Dean?
A "Jimmy Dean" was a country singer, a personality -- media personality, famous for his sausages eventually.
Q And "Monday Night Movie." It looks like they were "Monday Night Movie," "Saturday Night Movie," and these were different time slots, I guess.
A That's correct. They break out each half-hour time slot separately.
Q Let's go down to the gross audience.
MR. WILNER: Ginny, would you open it up again? Thank you.
Q The gross audience, American Tobacco, 469,525,000?
A Yes.
Q How can that be? There are not that many people in the country.
A Well, it double counts people. That is, if you watch "The Greatest Show On Earth" and then also watch "The Saturday Night Movie," you get counted twice. So if you were to take that number and divide it by the

population, you would get an estimate for how many times on average a person saw this cigarette commercial for American Tobacco this week.
Q Say it once more because I couldn't understand.
A Okay. That's a total audience figure. So it double counts people. If you see more than one show, you get counted each time you watch an American Tobacco Company show. So it ends up being larger than the population because many people are seeing both shows.
Q So you said something if you divide it by the viewing population?
A If you wanted to know how many times the average person was seeing an American Tobacco Company ad that week, you could divide that number by the population size, and that would tell you, well, the average person sees two ads a year, or something like that.
Q Well, how many ads per year -- how many cigarette ads per year did the average person see in 1963?
A The average person in 19 -- the average adult in 1963 saw nearly 2,000 television ads. 1945 I think was the exact estimate.

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Q Estimate, 2,000.

A Yeah, roughly 2,000.
Q 1,945 was the count as far as -- but they are all estimates, right?
A Well, that's right. But they are based upon this detailed data. So, they are reasonably precise estimates in my opinion.
Q Right. And that means that -- let me get this straight. 2,000 cigarette advertisements -- is this just television?
A This is just television.
Q Not counting -- not counting newspapers or magazines or billboards?
A That's correct. Nor retail signage, nor transit advertising, bus shelters or anything like that.
Q So, that's roughly five times a day?
A That's right, five to six times a day.
Q Six times per day? Now in the '60s -- we have seen some of the television ads. They seem a little longer than the ads -- than ads do today.
A They were. We are used to 30-second spots or less. Sometimes we see 10's, 15's and 20's. In those days the typical spot was a minute.
Q And did this -- this figure of 2,000 cigarette ads per year or about five to six per day, did that extend all the way up until they were removed from

television?
A I believe it's a reasonable estimate for that entire period, yes.
Q Now let me just fast forward us, although we will cover in a little more detail. After they got off television did people stop seeing -- did people stop seeing advertisements for cigarettes?
A Absolutely not. They just moved to other media.
Q And what kind of media?
A Well, particularly in the '70s magazines saw a big boom, and billboards.
Q And so by the 19 -- in the 1950's and '60s, and up to 19 -- '50s and '60s, that would cover up to 1970, we had TV doing 2,000 per year. What happened in the 1970's and 1980's? We had no more TV. But what did we have?
A Primarily magazines and billboards. Magazines and billboards were the major components. There's a lot of miscellaneous media and forms of promotion.
Q Movie trailers?
A Event sponsorships, things of that nature.
Q What do you mean "events"?
A Like the Virginia Slims Tennis Tournament,

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Lucky Strike Bowling, and so on.
Q Do people sometimes -- or did they used to get exposed to cigarette ads when they were in the movies, if they watch movies?
A Well, things that would function as cigarette ads. They would see people smoking, and often that placement in the movies was because of contractual relationships between the cigarette advertisers and the movie producers. It wouldn't look to the viewer like an ad. It would just look like the hero smoking.
Q You mean some of those were done by the companies actually paying the stars to smoke?
A Yes.
Q Who in particular do you know about?
A Sylvester Stallone is the most famous case.
Q Who paid him?
A Brown & Williamson.
Q So the -- so how would we estimate how much the people saw in the '70s and '80s from all this other stuff?
A Well, it's -- it's a bit difficult, but we do have some information from 1979, some test market results that indicate from the Cincinnati test market how much media exposure their spending there would generate. And if you scale that up to a national basis,

you come up with roughly the same number. You come up with an estimate of approximately 2,000 billboard exposures a year in 1979.
Q In '79?
A Yes.
Q All right. Now, and we will just go a few more questions, and then we will probably -- it will be time to take a short break. But let me go back to this list that we had that we were talking about, what the American Tobacco Company had -- how they were advertising on television. It's -- to complete the thought, if we were watching -- let's say we were watching some other show rather than "Gun Smoke" on CBS, or whatever day we picked.
Is this just the American Tobacco that we have right up on the screen now?
A This is. There would be similar schedules for each of the six firms in the industry.
Q All right. So let's just, for example, look at Liggett & Myers. So, here this is Liggett & Myers. We have "Outer Limits." Again, maybe on a different day, right?
A Yes.
Q I don't really -- yeah.
A That's right. It would show the days and the

programs.
Q So, then we have "Burke's Law," "Farmer Daughter," "Arrest and Trial," "Mitch & Miller," "The Virginian" and "Dr. Kildare"?
A Yes.

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Q Now that's interesting. Was there a history of doctors promoting cigarettes on television directly or indirectly?
A There were medical shows then just like we have the show "ER" now, and one of the famous ones was "Dr. Ben Casey," and he used to smoke on television.
Q Right in front of the -- I mean, in his doctor uniform?
A His character was a smoker.
Q And in the "Dr. Kildare" series is it your analysis from compiling this that we would watch a show about "Dr. Kildare," and then in the middle of it they would break and have a cigarette commercial?
A That's correct.
Q Okay. Let me just show a few others, and then we will take our break. This is a Phillip Morris sponsorship, correct?
A Yes.
Q Now there is something called "slot sponsorship." What does that mean?

A Well, slots refer to -- a slot is the half-hour time period. So, when you are buying television time, you buy what they call slots. So you buy the period from, say, 10:30 to 11, or you buy the period from 7 to 7:30. So, that's just a trade term for this block of time.
Q I see. So you have also compiled a -- you've broken this list down in another way, which is -- oh, wait. Let me show Brown & Williamson. All right. It was on the back. All right. That's Brown & Williamson's lineup as of 1963?
A And I see "Ben Casey" as one of the shows that they were sponsoring.
Q Oh, "Ben Casey." Okay. Do you know whether he smoked Brown & Williamson cigarettes on it?
A That I don't recall.
Q Okay. All right. Let me look real quickly at this.
A I would be surprised if he smoked a competitor's brand though.
MR. RILEY: Your Honor, object and move to strike the comment.
MR. WILNER: We agree.
THE COURT: Fine. I will strike that last comment.

Q Yeah. All right. Tell us what this is. Now this is very interesting. This says slot sponsorship from 7:30 to 8 p.m., and it has a list of shows, a network, and who the sponsor is and what day, right?
A This is the same data just organized differently. So instead of organizing it by the advertising firm, or the manufacturer, it's now organized by time slots. So this pulls together on one page all of the programs and sponsorship activity for cigarettes that would have occurred in the early evening

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hour here in between 7:30 and 8.
(Change of reporters, 10:35 a.m.)

Q This is the same day, they're just organized differently. So instead of organizing it by the advertising firm, or the manufacturer, it's now organized by time slots. So this pulls together on one page all of the programs and sponsorship activity for cigarettes that would have occurred in the early evening hour here between 7:30 and 8:00.

Q So let's pick this time 7:30 to 8:00 o'clock p.m. on Monday night. I see R. J. Reynolds has it for CBS; L & M, Liggett & Myers, has it for ABC; and American has it for NBC?

A That's correct.

Q Was there any other network available like that?

A No. In fact, not even PBS was in operation, as I recall, in the period, so this was it. And this is what media people call a roadblock. That is, no matter which channel you turn to, you encounter cigarette advertising. Just as if you set up roadblocks, no matter what road you try and take out of town, you encounter police.

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Q And you also compiled a list of teens and children that were up at 7:30 p.m. on Monday watching this stuff?

A That's right. This is the same data,

again, as we saw on the other pages, just now organized by time slot.

MR. WILNER: Your Honor. It's a good time to take a short break.

THE COURT: All right. Ladies and gentlemen, it's 25 minutes until 11:00. We'll take the mid-morning break, and I'll ask you to be back in the jury room at five minutes until 11:00. We'll be in recess until five minutes until 11:00.

(Short recess)

THE COURT: Are you ready to proceed, Mr. Wilner?

MR. WILNER: Yes, Your Honor.

THE COURT: Mr. Riley?

MR. RILEY: Yes, Your Honor.

THE COURT: Bring them in please, Mr. Tucker.

(Jury enters courtroom).

THE COURT: All right. Mr. Wilner, any time you want.

MR. WILNER: Yes, Your Honor. Is the podium in the way?

BY MR. WILNER:

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Q Dr. Pollay, let me show you an ad that's also been marked into evidence. It says, "Do you

inhale? Why is this a viable question so much avoided by other cigarette companies?"

Is this an early Lucky Strike ad that you're familiar with?

A Yes.

Q What is the effect on consumer expectation of this advertisement suggesting that people should inhale?

A Well, that there's no reason not to; that it's okay to inhale.

Q Now, we -- did Lucky Strike conduct a campaign on American colleges in the 1960s?

A Yes, they did, using both print and radio.

Q Is this a typical ad from that era?

A Yes. This is encouraging college students to write jingles. And they used those submissions in later ads.

Q What is the advertising purpose -- not intent but the, you know, the message behind using -- inviting students to write in and have jingles that they might publish in later ads?

A Well, in the process of doing any of that writing they are rehearsing an ad to themselves, in essence. That is, they're thinking and deliberating over the virtues of Lucky Strike.

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Q Let me show you another advertisement from the same era, and is this a typical advertisement from the Lucky Strike college campaign?

A Yes, it is. And I think all of those fine print verses would be attributed to authors from various colleges.

Q And these people that are in this ad, that is evidently enjoying themselves, these two college students, is this typical of a mid-1960s ad for Lucky Strike?

A Well, it's typical in showing a young couple enjoying themselves, yes. I think that was a very common format for this entire campaign.

Q And let me show you another. Do these people, to you, appear to be adults?

A Well, young adults. It's hard to tell exactly their age.

Q Now, also there was -- let me show you another one.

And what is the effect of this -- or what is the purpose -- or what is the effect of this kind of ad?

A Well, the effect of this was to, I think, a couple of levels. The most immediate effect was to make Luckies the most popular brand among college

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students; and, secondarily, to cause its popularity among even younger people. Because young people look up to those somewhat older than themselves as an aspiration.

MR. RILEY: Your Honor, I object and move to strike the last part of the doctor's answer, unless he's got some data --

THE COURT: Wait a minute.

MR. RILEY: I object and move to strike the comment --

MR. WILNER: Your Honor, we'll agree. Let's move on.

THE COURT: I'll strike that portion of his answer and ask the jury to disregard it.

BY MR. WILNER:

Q And let me show you this ad. It says, "Oh, you kids, Lucky Droodles." Do you know what this is about?

A This is another campaign from the same time period targeting college students, and droodles were a style of cartooning where it was a bit of a puzzle to figure out what the drawing was all about. But when you found out, it usually would be a humorous caption.

Q And what was the point of all of that?

A Well, again, to create this lighthearted attitude and feeling, like the jingle writing thing,

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to get the students involved in thinking about Lucky Strikes in creating submissions in this contest and droodle making process.

Q Droodle making?

A Yeah.

Q All right. And then was there also another theme, and that was the family theme?

A Yes, both on specific days like this one for father's day, and, also, of course, at the Christmas holidays.

Q And is there a specific Christmas photo or advertisement that you're familiar with?

A Yes. This one shows the entire cast of the "Jack Benny" radio and TV show in this particular Christmas ad.

Q What is the effect on consumers' perception of safety when the theme is, "Have a Happy Christmas"?

MR. RILEY: Judge, can we get a date on this, please?

THE COURT: Okay.

BY MR. WILNER:

Q Could you give us a date?

A I think it's 19 -- there may be something on the document itself that helps establish this, but I would judge it to be '53 to '55, in that era.

THE COURT: Okay.

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Q Okay. And this, the "Remember Dad," do you know when that was?

A I don't. I mean, my expert judgment is that it's from the same period, but I can't be more precise than that.

Q Okay. And you were saying? What has this family theme got to do with somebody -- with people's perception about the problem?

A Well, certainly that it's a safe thing. You wouldn't knowingly give a member of your family something that was going to cause them great deal or harm.

Q Have you -- we mentioned we had two rolls of videotape, and we played one. Does the other also have illustrative -- or examples of ads that ran in the 50s, 60s and 70s --

A It does.

Q -- that I can ask you about?

A Yes.

Q Okay. Let's play that real fast, and then we'll go on to the next one.

Good night, Mr. Cummings.

Good night, Mr. Cummings.

Good night, Duane.

Hey, Cat, do you want to spin some platters?

Yeah, that would be groovy.

- - -

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BY MR. WILNER:

Q Let's stop this for a minute.

What is this all about? Do you recognize Bob Cummings?

A Bob Cummings was a major star. He had his own show called the "Bob Cummings Show."

Q And this gentlemen and young lady over here who were using "Cool Cat" and that, was that what was talked about on the Bob Cummings show, or what?

A Well, that I don't know, but the reference of spinning platters was playing the old records.

Q All right. Please continue.

- - -

Let's blast off.

Got wheels?

They're on.

Crazy.

It loses a little something in translation, but do you know what happened there? Now, Dwayne invited Holley to play some records to which she replied in the affirmative, provided they were of particular excellence, which they were, and, further, provided he had the means of conveyance, which he had, and she seemed very pleased about that.

I can remember when "hip" meant a part of

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the anatomy, and a cat was a fur-bearing animal. I can also remember when Kool cigarettes meant one without much flavor. But Winston does change all of that. Here is a cigarette with a filter so effective that it lets the real tobacco flavor come through for you to enjoy.

Try Winston. I think you'll dig them the most. Winston tastes good, like a cigarette should.

Well, good night, folks. See you next week.

- - -

Oh, hi. Have a good time at lunch?

Don Juan did.

Our Rob?

Look at it this way.

I know, 36-24-36.

The cigarette girl, she was telling me how it is smoking and how to change the filters.

And how popular Kent is.

I told her how Kent satisfies best.

Oh, repartee.

- - -

BY MR. WILNER:

Q Let's stop that for a second.

Doctor, do you recognize these folks?

A Yeah, the Dick Van Dyke Show. Mary Tyler Moore is the woman.

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Q Now, are they actually in the show here? I mean, what's going on?

A Well, it seems so. I mean, this is an example of how the advertisement was so tightly integrated with the show that it's hard to know where the show stops and the ad begins. In fact, for editing purposes it's very difficult to extract the ad without it also extracting part of the show.

Q Play it, please.

- - -

Kent cigarettes.

Well, then offer me one?

Okay.

Thank you.

The "Dick Van Dyke Show" has been presented by Kent cigarettes. Kent with the micronite filter. The cigarette that gives you filter, taste and pleasure.

The American Tobacco Company. The American Tobacco Company, American's leading manufacturer of cigarettes, Lucky Strikes, Pall Malls, Herbert Taryton, with the genuine smoke.

Oh, that makes me --

- - -

BY MR. WILNER:

Q Let's stop for a second. What was that all about, the American Tobacco with the trumpets

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playing in the background?

A I'm honestly not sure. I mean -- I mean if --

Q All right. Well, let's stop. All right. We'll go on to the next one.

- - -

Tonight's show was brought to you by your dependable Dodge dealer.

Oh, remember to watch Bert Parks in "Break the Bank" on this same network. Check your newspaper for the time station.

Remember, too, that Dodge has done it for '55.

Good night.

Good night.

- - -

I've just been playing some great hit songs of the past. You know, it's an exciting thing to watch the way a new song becomes a hit song, the way it catches on and grows in ever increasing popularity.

And I'll tell you something, that's just the way I feel about another big popular hit I've got right here, the wonderful new Phillip Morris, king size. From the very first day it was introduced, this great new king-size cigarette has been going up and up and up in the nation's favor. What is it exactly that makes this one cigarette,

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this new king-size Phillip Morris, the most outstanding success in cigarette history?

It's very simple. It's got quality, a special quality of throat comfort, of gentleness, a deep, full, rich flavor you just won't find in any other brand. That quality of gentleness is something you feel right here. Yes, your throat can tell that this one, this new king-size Phillip

Morris, really tops them all, for all of the goods things you want in a cigarette. I hope you'll try them. I know you'll like them. Because if it's Phillip Morris, king size or regular, it's America's finest cigarette.

- - -

Oh, thank you, dear.

Hey, the last one. You better get another pack.

Okay.

Thank you. You probably think that we're making a big fuss over cigarettes. Well, sure, you don't really have to keep this wonderful new king-size Phillip Morris cigarette in a safe. It's just our way of telling you that they are kind of precious. The finest king-size cigarettes in America today. Smooth, mild and mellow and easy on your throat. How about you trying them yourself?

Hats off to Phillip Morris, king size or

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regular. Buy them by the carton. You're going to love them, and we're going to love you.

Hey, what was that for?

You said it so beautifully.

Good night everybody.

See you next week.

- - -

Do you have a cigarette, Dear?

Sure, Honey, try a Newport.

They're huge.

It's an optical illusion. Newport always seems bigger and better than other cigarettes.

- - -

BY MR. WILNER:

Q Stop that for a minute.

Who is this?

A Joey Bishop, a comedian.

Q Okay. Go on.

- - -

They taste better, too.

Are you sure they're regular Newports?

Of course. Fine white filter, menthol and mint, great-tasting tobaccos. Only Newport has all of that.

But the size. Put your cigarette lighter next to them.

Okay. Buy Newport, folks. They come with or without the optical illusion.

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- - -

Something wonderful happens. When you change to Phillip Morris, you'll feel better.

Did you say I'll feel better smoking Phillip Morris?

Yes, you'll feel better. And here are the reasons why: In case after case coughs due to smoking disappear, parched throat clears up, that stale smoked-out feeling vanishes.

That is wonderful.

When you change to Phillip Morris, you really taste your cigarette once again. The clear, clean taste of fine mellow tobacco, and your food will taste better, too.

But why do these wonderful things happen when I change to Phillip Morris?

Because you'll be smoking the one cigarette with the difference in manufacture, an important difference that avoids a common cause of cigarette irritation.

BY MR. WILNER:

Q Stop that for a second.

Is this an example of one of the older health -- health claim ads?

A Yes. I estimate that this comes from around 1950. This is before the introduction of the king size, which was in '52, and this is the

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explicit references to throat and throat

irritation.

Q Okay. Please play.

- - -

You'll be smoking these cigarettes recommended by eminent nose and throat specialists to patients who smoke, the one cigarette proved definitely milder than any other leading brand. Whether you've been smoking for ten months or ten years, something wonderful happens. You'll feel better when you change to Phillip Morris.

So, remember, next time you buy cigarettes, be sure you call for Phillip Morris and feel something wonderful happen to you.

- - -

The number of extra puffs that you get with Benson & Hedges 100's depends upon how you puff. New filter tipped Benson & Hedges 100's are longer than king size. Three puffs, four puffs, maybe five puffs longer than king size, providing of course you do puff.

- - -

I won.

Well, I've had it.

Oh, come on, Bill, one more game. Look, you've been just been missing them all today.

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Yeah, something's missing in this cigarette, too.

What?

Oh, there's no taste in them any more.

Well, you ought to make a change.

Huh?

Yeah, make a change right then. Here, have a Kool.

Kool, hey?

That's not tasting cool enough till you start a box of Kools. Kool's menthol, natural, taste, refreshing all day through. Feel extra coolness in your --

- - -

BY MR. WILNER:

Q Stop that for a second.

How effective are these jingles in getting people to buy cigarettes?

A Well, they're effective as a memory device. Jingles often come back to us in our minds. In fact, sometimes we can remember a jingle many many years later after it's no longer been played, so it sort of helps the brain file the advertising, selling message away, and so that then when you see the package in the store front, or

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something like that, you have a different attitude towards it.

Q Okay.

- - -

Kool comes through for you.

Hey, you're right.

You'll be smoking Kool, Kool all the time when you feel cool.

Kool, the optive cool. The most refreshing cool you can get in any cigarette. Smoke Kool with the pure white filter.

- - -

You can take Salem out of the country, but you can't take the country out of Salem. You can take Salem out of the country, but you can't take the country out of Salem. Let Salem be your taste for the country. Salem gently --

- - -

BY MR. WILNER:

Q Stop that for a second.

What is the effect of this country fresh business, this "can't take Salem," or whatever, out of the country?

Q Well, the country freshness conveys a certain helpfulness if you're in a pure and pristine

environment. And the jingle here became very well established, and they capitalized on the memorability of this jingle by stopping just before

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the conclusion of the jingle, "You can take Salem out of the country, but" -- because they new the audience would complete it.

And so you may even see that in this version where they don't -- when they sing it the last time, they don't finish it because it invites the consumers to get engaged and complete the closure.

Q Okay.

- - -

It's country soft, country fresh. Take a puff it is Spring time. You can't take the party out of Salem. Try American's largest selling menthol cigarette, Salem. You can take Salem out of the country, but --

Q Is that what you meant?

A That's what I meant.

- - -

You've got a good thing going, good thing going when you light up a Kent. Good taste, the kind of good taste that brightens up your day. It comes from Kent's exclusive flavor blend of the

world's finest tobacco. A good taste through the Kent filter that's milder, lighter and more refreshing.

Kent is the one cigarette for everyone who smokes. Light up a Kent. You've got a good thing

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going. Good tobacco or a good taste going when you light up a Kent. Brighten up your day, light up a Kent.

- - -

BY MR. WILNER:

Q All right. Let's stop that for a minute I'm going to ask you a few questions.

Ginnie, if you'll see if there's anything we need to show further on there, we'll just cut it short.

Dr. Pollay, we've seen a bunch of advertisements and, as I indicated before, I mean, we all live in a sea of advertising. Does advertising make people buy products?

A Not directly. That is, we don't kind of jump up out of our chairs and race off to the store simply because we've seen an ad. But it does shape our attitudes and our perceptions about the products and influence particularly the young in terms of what they're interested in trying and experimenting

with. So the answer is, yes, it's just the effect is not instantaneous. It takes place over time, as the result of repeated exposures to many different advertisements over time.

Q I've heard people say people don't start smoking cigarettes because of ads, they start smoking because they're friends or their peers smoke. Now, does that -- what does that have to do

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with advertisement?

A Well, I think there's lots to be said about that line of argument. First of all, it's not either/or. I mean, friends can have an influence and advertising has an influence. And when you think about, well, what's making an impression among the friends, or why are the friends smoking, you ultimately come back to having to think about the role of advertising on the friends.

And what makes a particular brand look cool or have prestige, say, among teenagers or look masculine feminine, I mean, all of these image attributes come from the advertising. They're not inherent in the product.

Q You mentioned the word "cool," and I have heard it said, you know, kids smoke because it's cool. Have you ever heard that?

A Yes, I have.

Q Who made it cool to smoke?

A Primarily advertisers.

Q Now, have you looked at how much money has been spent to persuade people to buy cigarettes in any given year by the cigarette industry?

A Yes, I have.

Q And has that had a direct impact in your opinion on consumer expectation, not only purchasing habits but what people expected the product would do

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to them if they used it?

A Yes.

Q So how -- did you estimate the amount of advertising and promotion that was done by the cigarette industry for the 1994 Surgeon General's report?

A Well, part of -- I think the budget figures were part of what I drafted, but there is additional information in the report from other sources.

Q How much did the industry spend in 1994 on advertising promotion?

A In 1994 I believe the figure's about 6 billion dollars. It's certainly over five. And I'd say that's billion, not million.

Q And have they spent on advertising -- since the 1950s have they spent a great deal of money on advertising?

A Yes, an increasing amount with every passing year.

Q Have you helped compile a table that happens to go from 1963 to 1984 -- 1984 not 1994 -- on cigarette advertising expenditures from the FTC?

A Yes, based upon the data of the FTC reports.

Q And let me show you that table. Is this -- now these are -- these are advertising expenditures for the industry?

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A Yes, on behalf of cigarettes by the entire industry.

Q And in 1963 it was 249 million dollars?

A That's correct.

Q And then it kind of went up and down a little, and then up, until in 1984 it was $2,095,000,000?

A Yes, that's correct. And it continued to grow after that period, I'd say by the current -- the most recent data is over 5 billion a year.

Q How does that rate with other common products that we see on the market?

A It's an enormous advertising expenditure. I mean, it's on the order of over $15,000,000 a day, so, I mean, it's a big hunk of change.

Q Are there other products -- I mean, how does it compare with like, you know, our other common products, cars and things like that? Is it comparable or --

A Yeah. I think it's comparable to some major product catagories like automobiles, so it's certainly one of the heaviest advertised products in our economy. But there are others that are also heavily advertised.

Q Now, the advertising that we have talked about -- and let me ask you this first: Have we showed all of the ads that people have seen over the

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years?

A Oh, of course not. I mean, there were literally thousands and thousands of examples.

Q The ones that we've shown here, are they just tips of the iceberg, so to speak?

A What we just saw, for example, that reel, I counted, I think, seven ads. You would have seen that in a typical evening of watching television.

Q So, as I understand it, though, people did not only get their information about cigarettes from

advertisement? Well, let me ask you another one. Where did people get information about cigarettes from?

A The reason I hesitated, I don't think they get much information from the advertisements. They get exhortations and encouragements, and their perceptions are being shaped, but there's not a lot of data or hard fact in a lot of these -- particularly the modern style of cigarette advertising.

Q All right. Did the cigarette industry and American -- including American Tobacco and Brown & Williamson -- conduct at important times, including the 1950s, public relations campaigns designed to affect -- to affect the information that was coming to the public?

MR. RILEY: Your Honor?

A Yes they did.

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MR. RILEY: Your Honor, I object.

THE COURT: All right.

(Side-bar conference held outside the hearing of the jury).

MR. RILEY: Your Honor, my objection simply goes to the use of the term design, and the question really is intent and is he qualified to get

into somebody else's mind, and that's my only objection.

THE COURT: Well, you know, he's presented as an expert witness on advertising. I think on cross-examination you can ask him to what extent he was aware of any internal mechanisms involving Brown & Williamson and tobacco companies and how they arrived at the ads, but the problem I'm having is, I mean, he is an expert witness in this field and he is giving his opinion on the subject. And if you want him to say in my opinion this is what they did as opposed to they did this for this reason --

MR. WILNER: I don't think an expert has to be forced to add constraints of language. His testimony --

THE COURT: That's what I'm saying. I think you can go into cross-examination as to what he actually knew about the various ads by Brown & Williamson and American Tobacco Company, so I'll overrule the objection.

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(Side-bar conference concluded;
proceedings resumed before the jury)
BY MR. WILNER:
Q All right. I lost my train of thought again, and I'm sorry. It last about a minute and

then I forgot.
But did the -- did you -- did the cigarette industry, and American Tobacco and Brown & Williamson in particular, have a public relations campaign beginning in the 1950s to affect what information their consumers got about cigarettes?
A Yes, they did.
Q All right. And remember earlier we talked about the -- this Hill and Knowlton. I wrote it down, Hill and Knowlton and John Hill.
Now, did you study how Hill and Knowlton and the John Hill's firm was hired by the cigarette industry, including American Tobacco, to influence and change public perception about cigarettes?
A Yes, I did.
Q And was that part of your expertise and study as a professional in advertising and marketing?
A Yes, it was.
Q And was this the -- in part, the study that you did on the John Hill papers which were released to the public in 1989 and you were there?
A Yes, that's correct.

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Q And have you compiled a set of the documents under Hill and Knowlton that you received

from the Hill -- from the State of Wisconsin archives in 1989?

A Yes, I did.

Q Okay. Let me -- do we have an evidence book? I'll get you the right copy.

Thank you, Ginnie.

So let me hand you this book that we have put together and ask if that is the -- that those documents are documents that you are familiar with from that source?

A Yes, they are. And I notice many of them have the notes that I wrote as to the -- which boxes they came from and so on, which files.

(Change of reporter, 11:30 p.m.)

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Q And you are -- you have reviewed those documents, and were they important to you in arriving at opinions about what was done by the industry beginning in the 1950s to affect public opinion?

A They were, and I reported those opinions to an academic audience in a formal publication.

MR. WILNER: Your Honor, the plaintiff would move into evidence the volume entitled Hill and Knowlton documents.

MR. RILEY: Your Honor, we do have objections to some of the documents in that group.

THE COURT: All right, sir.

(Side-bar conference held outside the hearing of the jury)

MR. RILEY: Judge, just to layout, generally, what some of our objections are. In the first place, we object to these documents on the grounds that there can be no showing that Mr. Maddox ever read or heard or saw any statement or publication by Hill and Knowlton or by the TIRC or by the CTR. And for that reason, these documents are irrelevant to the lawsuit.

In the second place, Your Honor, many of the documents that counsel seeks to introduce, some

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of them are drafts, and we're not sure that any of the items discussed in there were ever implemented, for example. And in addition, some of the documents, I believe, are not materials that Dr. Pollay took from the archives and have not been properly authenticated.

And in fact, the very first one, for example -- I'm just using this as an example -- we don't know who wrote it; we don't know when it was written; we know nothing about the document. And we don't know whether it has any connection to the American Tobacco Company or Hill and Knowlton or to CTR.

So, for that reason, this document, in particular, is objectionable. There's no connection between this document and the case. There's no suggest -- when he received it or when it was written or who wrote it.

MR. WILNER: Your Honor, it's almost impossible to respond to this argument because it has so many different bizarre twists to it.

Number one, he says, I would like to introduce a new standard of evidence that the plaintiff has to know about secret documents. If that were true, no asbestos case would ever have

gone forward. This is part of a conspiracy; the

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conspiracy was to affect his perceptions; expert testimony will be that it did. This is their state of mind --

THE COURT: Let me say this, Mr. Riley. If you would tell me the specific documents, they're number one through 32. I don't know if there is more than one document in each tab, but there's 32 tabs.

MR. WILNER: Call it a document per tab.

MR. RILEY: Certainly Tab No. 1, Your Honor. We object to it on the grounds that there's no identification of who even wrote it, when it was written or who it was sent to.

THE COURT: Keep going. Let him list the ones he objects to. And what I'm going to ask you is, can we finish up to lunchtime without showing these particular documents or making reference to them?

MR. WILNER: I don't know. It depends on what he's got.

THE COURT: That's why we need to know what he's objecting to. No. 1.

MR. RILEY: Judge, I know Tab 8 has --

THE COURT: Wait. Mr. Wilner needs to

hear this.

MR. RILEY: Tab 8 has your summary of the documents in --

MR. WILNER: It shouldn't be in that one.

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Source: http://www.industrydocuments.ucsf.edu/docs/tmhd0001

If it is, we'll take it out before the jury sees it.

MR. RILEY: Okay.

THE COURT: Okay. So that's not an objection. Is this --

MR. WILNER: No, that's part of the document.

THE COURT: All right.

MR. MATTHEWS: What has he objected to?

MR. WILNER: 1.

MR. RILEY: Document No. 24, Your Honor, appears to be a draft.

MR. WILNER: What? Which document number?

MR. RILEY: 21.

THE COURT: I thought you said 24.

MR. RILEY: I'm sorry, 24.

THE COURT: Send the jury back for a few minutes. How long will it take you, Mr. Riley?

MR. RILEY: I think I'm almost through, Your Honor.

THE COURT: Okay.

MR. WILNER: 1 and 24.

MR. RILEY: 31, Your Honor.

MR. WILNER: 31?

MR. RILEY: I think that's it.

MR. WILNER: That's it?

MR. RILEY: Yeah, other than our general

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objections, Your Honor.

THE COURT: I understand.

MR. WILNER: 31, we'll withdraw because it's not necessary. It's a modern document that explains the pedigree.

THE COURT: Take it out then. How about 24 and 1?

MR. WILNER: 24, I don't -- his objection is it's a draft. I don't think that's a valid objection. But to save time, let's proceed on without it, and we'll argue it when we get the jury -- when have a break.

THE COURT: If you don't have to use it during the rest of his testimony before lunch --

MR. WILNER: Before lunch, I don't.

THE COURT: Okay. That's all I was saying.

MR. WILNER: As to 1, I would like to start with 1. It is signed EFD. It is stated that

it is the State Historical Society of Wisconsin, that is just where it came from.

He has testified he got it from the State Historical Society of Wisconsin. It's part of the set that is written by the same set of people, whatever their initials are, that read all of this. And I think it's Mr. Darrow, because it's written by EFD. And we can clear up the author, if it's important, but it's written by Hill and Knowlton as

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he can testify to because they all came out of the same box. I can establish that.

MR. RILEY: Judge, they didn't all come out of the same box. In fact, Dr. Pollay said he wrote on these documents the numbers of the boxes they came out of. This document does not have it; this witness did not get this document from those archives.

MR. WILNER: I don't know. We can ask him, I suppose. But this trial exhibit stamp shows that this document was admitted into evidence in the Minnesota case, so its authenticity has been accepted by the Minnesota court. We have --

THE COURT: If you'll question him about.

MR. WILNER: Authenticity?

MR. RILEY: Ask him whether he got this

from the archives.

MR. WILNER: Sure, okay. That's fine.

THE COURT: Other than that, I'll overrule the objection.

MR. WILNER: All right.

(Side-bar conference concluded; proceedings resumed before the jury)

MR. WILNER: May I approach the witness?

THE COURT: Certainly.

Q Dr. Pollay, would you look at Tab No. 1, please. Do you recognize the document No. 1 as

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being part of the collection of Hill and Knowlton documents?

A Yes, I recognize it as such. And it's stamped as being sourced from that archives.

Q From what archives?

A The State Historical Society archives in Madison, Wisconsin.

Q All right. It doesn't have the same stamp, the same -- turn to document No. 2. All right. See document No. 2 says "HK-60"?

A Yes.

Q Is that your writing?

A Yes, as is the smaller writing at the top.

Q Document No. 1 doesn't have the same

writing, that was the question. But can you confirm this to be part of the same collection?

A Yes, I believe it to be part of the same collection.

Q And that collection was maintained by the state historical society and seen by you when the boxes were opened?

A Yes.

MR. RILEY: Your Honor, may I ask a couple questions?

THE COURT: All right. On that particular document?

MR. RILEY: Yes.

VOIR DIRE EXAMINATION

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BY MR. RILEY:

Q Doctor, is any of the handwriting on that document yours?

THE COURT: No. 1?

Q No. 1.

A No, it's not.

Q You did mark on the other documents that you took from the archives. You made handwritten notes of the boxes that they came out of, correct?

A That's correct. I copied some materials to bring back home to my own university in

preparation of the article I was working.

Q But Tab No. 1 doesn't have any of your own handwritten notes on it, does it?

A That's correct.

Q And you didn't copy that document out of the archives, did you?

A That's correct.

MR. RILEY: Thank you.

DIRECT EXAMINATION (Continued)

BY MR. WILNER:

Q You saw it in the archives?

A Yes, I believe so.

THE COURT: All right.

MR. WILNER: Your Honor, I don't know if we're going to debate it again -- and I guess we'll go debate it again.

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Source: http://www.industrydocuments.ucsf.edu/docs/tmhd0001

(Side-bar conference held outside the hearing of the jury)

MR. WILNER: Let me make my reply, if I might. Number one, if this is an argument to authenticity, then I don't really hear what counsel's saying. But if he's saying that we have to get a statement from the Minnesota court that this document is what it is and that that trial exhibit number of Minnesota is not sufficient to

establish authenticity, then I'm taken aback, but we will do that. I can't believe that counsel does not accept that that is a trial exhibit.

THE COURT: Not so loud.

MR. RILEY: Judge --

THE COURT: I was just saying not so loud. I didn't want the jury to hear.

MR. RILEY: I'm trying to investigate whether this was, in fact, admitted in Minnesota and whether, in fact, it came out of the archives and whether that was shown in Minnesota because I just don't know.

THE COURT: I guess what bothers me, Mr. Wilner, is the statement that "I believe it is" or "I think it is," and, you know, he's sure that the others are. And he's saying, you know, I assume this is in effect.

And I think if the objection is on authenticity, it's not whether or not -- I mean

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it's whether or not that should be part of these Hill and Knowlton documents, not whether it should ever be introduced into the trial.

MR. WILNER: I understand. Let me question him some more. If his responses are ambiguous, let's clear it up. It says on there the

same historical society that he got it from. So this is really a tempest in a teapot.

THE COURT: It could be, but I'm trying to protect the record also.

MR. WILNER: I understand. Let me ask him again.

THE COURT: All right.

Q Dr. Pollay, would you look at Document 1 again. And look at the stamp at the top that says State Historical Society of Wisconsin, Archives Division; do you see that?

A Yes.

Q Now, tell us within -- what is most probable. Did you see this document in the Hill and Knowlton collection?

MR. RILEY: Judge, I don't think that's a proper question.

THE COURT: I'll sustain the objection to the form of the question.

Q Did you see this document in the Hill and Knowlton collection in the state archives -- State

http://legacy.library.ucsf.edu/tid/tmh05a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/tmhd0001

Historical Society of Wisconsin, Archives Division?

A I believe so. I'm sorry I'm not more precise about that. It was a decade ago and I have seen this document since as part of the Minnesota

trial.

Q You saw this document as part of the Minnesota trial in addition?

A I believe so, yes.

Q Was this document admitted into the evidence?

A I believe so.

MR. RILEY: Your Honor, the witness has no --

THE COURT: If you want to argue it -- make your objection.

MR. RILEY: I'm sorry. Foundation, Your Honor.

THE COURT: I'll overrule the objection.

Q Let's begin, then, Dr. Pollay with Document No. 1.

MS. STEIGER: I don't have an extra one.

MR. WILNER: You don't have an extra one? I thought we did. We have another Hill and Knowlton book. We have an evidence copy and two others. Stand by, we'll find it.

MR. RILEY: Your Honor --

THE COURT: You want to approach the side bar a minute?

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Source: http://www.industrydocuments.ucsf.edu/docs/tmhd0001

(Side bar, Court and counsel)

MR. WILNER: Let's see how we are able to proceed. I know we have another copy, which we evidently don't have right here, but we'll do the best we can til lunch. We'll grab our other copy at lunch.

Q I want you to start with this document, Dr. Pollay, and explain -- I'm going to read a little bit, but I want you to explain what was going on in 1953 and '54 and why that's important on the issue of how the cigarette industry affected the perception of cigarettes by its consumers?

MR. RILEY: Your Honor, can we just get the exhibit number and tab number that's been shown?

MR. WILNER: It's No. 1 from the evidence -- I don't think we've marked-- we need to mark the book. We did not finish marking the book.

(Plaintiff's Exhibit No. 28 was marked for identification.)

THE COURT: It will be Plaintiff's 28.

MR. WILNER: Dr. Pollay, let me have that book, if I might, for a minute, so the Court can put its stamp on it. I know you were going to ask me what number and I didn't have one. Thank you.

Okay. I'm just going to need another

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copy. I can't read it either place.

Q Dr. Pollay, I'm going to see if we can use your copy to put up on the overhead until lunchtime, and then we'll get another copy, because I can't read it that way.

All right. Let's put page one up. Okay. This starts out as -- it says "To Members of the Planning Committee." Now who is it that's doing the writing here?

A I'm not sure. There's a signature or a --

Q I don't mean the individual, I mean the organization.

A Hill and Knowlton as part of the planning for the Tobacco Industry Research Committee efforts.

Q And it says, "This is, of course, a most (sic) challenging problem our organization has ever faced and perhaps the most challenging problem that ever faced a great industry, one with annual sales of almost $5 billion at retail and with economic roots that reach clear back to the farm.

"The serious nature of the challenge ceases one as he explores the material enclosed. You'll find that some of this information is confidential and requires treatment as such. To have omitted it would have foreshortened the

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Source: http://www.industrydocuments.ucsf.edu/docs/tmhd0001

picture.

Then I'll -- this is kind of a lead-in to the question. Page two: "The attitudes of the men we must directly deal with in the industry is at once interesting and important for us to understand. That is why notes on the four interviews with research directors are given at some length. You'll get from them little real information about lung cancers, pro or con, but you'll find some mighty interesting opinions."

Dr. Pollay, explain to us what's happening here, based on your review of all the documents.

A Hill and Knowlton has been conducting interviews and, essentially, compiling briefing documents so that everyone can be reading from the same page -- that is to pull together the information so that the planning committee can come to some concerted action and policy positions.

Q Who hired Hill and Knowlton?

A I believe Mr. Hahn of American Tobacco. He convened a meeting at the Plaza Hotel in December '53.

Q You prepared a diagram of who is who, so to speak, in this initial coming together in the 1950s.

A Yes.

Q Do you have that with you?

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Source: http://www.industrydocuments.ucsf.edu/docs/tmhd0001

A With your assistance.

Q And what does this diagram represent?

A It shows the industry's gathering --

MR. RILEY: Your Honor --

(Side-bar conference outside the hearing of the jury)

MR. RILEY: Judge, that board's extremely argumentative. I object to that. That's not proper.

THE COURT: Pardon me?

MR. RILEY: It's not proper to put up a board that's argumentative like that. He can't -- I mean, the board is improper, Judge. It's just an argumentative -- there's pejorative stuff in there; it's inflammatory and prejudicial.

THE COURT: I'd like to see it.

MR. NYHAN: Have you seen it?

MR. RILEY: I'm not sure I've seen it in this form.

MR. WILNER: Your Honor, we can do this with a chalkboard, if we want to. This is just a graphic aids; it's not evidence to the jury. But we can sit there and draw the whole thing out if he

would prefer to do that.

THE COURT: What is your objection to, the word "conspiracy"?

MR. RILEY: Conspiracy, scientific fraud --

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Source: http://www.industrydocuments.ucsf.edu/docs/tmhd0001

MR. WILNER: What are we --

MR. RILEY: -- propaganda.

MR. WILNER: Your Honor, there's no -- we can't sanitize our language for this trial to make Mr. Riley happy.

THE COURT: I mean, what is the purpose of the chart?

MR. WILNER: To show who's who and how the organization was done in the '50s, as I will explain. This is Hill and Knowlton here, through John Hill. They were hired by the TIRC. These people all formed the TIRC; hired Hill and Knowlton. We've got to explain who's who, who Mr. Hahn is, who Mr. Tucker is, how they relate to the different organizations, what the TIRC did. This is all part of the conspiracy.

MR. RILEY: Judge, also one other point. I would just draw your attention to the issue about lobbying. It's protected by the First Amendment. They can't base any claim against the industry or

against American or Brown & Williamson based on the fact that they lobbied. It's a First Amendment right, Your Honor.

MR. WILNER: They are lots of First Amendment rights that you -- you have the First Amendment right to advertise, but that doesn't mean it's protected.

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THE COURT: I don't -- what is protected about comments about lobbying, if you will? I mean, they may have a First Amendment right to lobby, and they can't -- I'm not going to charge the jury that if you found they lobbied Congress or anything, that they're liable.

But if you're talking about a conspiracy, which Mr. Wilner is alleging, why would it be improper?

MR. RILEY: Judge you can conspire to lobby. I mean, there's nothing -- it's protected by the First Amendment of the Constitution.

MR. WILNER: So is advertising.

MR. RILEY: You can't base a claim on the fact that somebody lobbied.

THE COURT: But a conspiracy claim is based on their overall conduct; is it not?

MR. RILEY: Your Honor, it certainly is,

but I guess my point simply is one part of the conspiracy cannot be lobbying.

MR. WILNER: It can, because the lobbying effects public perception. And even though we're not charging them separately with a lobbying violation, they have argued from the start of this case that the conspiracy didn't affect him. And we have to show that it affected something.

And this is the web of how it affects things. This is how I prove my case of conspiracy.

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I don't know what we can do right.

MR. RILEY: Judge, if that's what this case is going to be, I think that that claim is highly speculative, and I think there's case law that says that that kind of claim would not be justiciable, it can't be adjudicated; it's improper. And I think --

THE COURT: If he had evidence that the companies paid congressmen to vote their way, that's protected by the First Amendment?

MR. RILEY: First of all, I don't think he does.

THE COURT: I don't think he does either, Mr. Riley, and I'll say that on the record. But I'm talking about, you know, there are limits to the

First Amendment protection.

The First Amendment protects them and their ability to lobby, but not to break the law. And he's accusing them of breaking the law. So, I mean, why wouldn't it if it's in furtherance of a conspiracy, why would it be inadmissible?

MR. RILEY: I also think, Judge, that are limits on what the courts can do and what they can't do, and I don't think courts are entitled to look behind the legislation, and they're not entitled to second-guess what the Congress has done. If Congress has passed certain laws --

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THE COURT: I don't know what he's going to say about -- if he starts talking about particular laws and which congressman voted for them and which didn't and why, I may sustain the objection. But just the fact that they do lobbying, you mean, that's protected?

MR. RILEY: Your Honor, I'm not --

MR. RILEY: This claim doesn't go anywhere unless he can take it to the next step, which is that the lobbying did something. He's now saying he wants to show through this conspiracy that the industry lobbied congress and that the Congress, therefore, did certain things or didn't do certain

things. If that's the way he's trying to tie this conspiracy to Mr. Maddox, he cannot do that under the law because this court cannot second-guess what this Congress has done. This jury cannot do that.

MR. WILNER: If we could proceed, you will see that we will ask questions that make sense and that are, I hope, not objectionable. But we can't anticipate everything he says, I'm going to do this, I'm going to do that. I don't know.

THE COURT: You've already shown -- or he's already testified to that's a chart that he and you made.

MR. WILNER: True, of course.

THE COURT: Which is merely an aid.

MR. WILNER: That's all it is.

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Source: http://www.industrydocuments.ucsf.edu/docs/tmhd0001

THE COURT: And if your objection is to the chart, what would Mr. Wilner not be able to draw on the board?

MR. NYHAN: Your Honor, I object to the --

MR. WILNER: Are we going to have both lawyers objecting? If we are, I'm going to get everybody up here. It's unfair to me to start having both lawyers chiming in.

THE COURT: You can talk to Mr. Riley.

(Counsel conferred)

MR. RILEY: The title is argumentative and they go to the ultimate issues in the case. They are questions of fact that should not be put to the jury in this form; conspiracy; fraud; propaganda.

MR. WILNER: How many -- how can we sanitize our language to please the cigarette industry?

THE COURT: I don't have a problem with it, since it's clear that it's a chart made by Mr. Wilner and what -- with the aid of Dr. Pollay. So, I mean, it's not going into evidence as a piece of evidence, but as a prop to explain the relationship to the jury. I don't have a problem with it, over your objection.

(Side-bar conference concluded; proceedings resumed before the jury)

Q Before we go into the Hill and Knowlton

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documents, I thought, perhaps, you should explain to the jury how the -- the colors aren't so good, unfortunately. We'll do the best we can -- who Hill and Knowlton is; how it relates to American Tobacco and Brown & Williamson; and what the organizations were.

So could we start over here? I hope that's visible. That says American Tobacco?

A American Tobacco.

Q And over here is Hill and Knowlton?

A Hill and Knowlton.

Q And that's John Hill, the guy whose papers went into the depository and whom you got them --

A That's correct.

Q And over here is Paul Hahn and he was the president of American Tobacco at the time?

A He was.

Q And over here we have Brown & Williamson?

A Yes.

Q Can you see it, because it's --

A I can. The colors makes it difficult, but I can see it.

Q All right. And then Mr. Irwin Tucker. Do you know who he is?

A Yes.

Q And then in the center of all this is something called "TIRC," although it's a poor choice of colors. TIRC is what?

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Source: http://www.industrydocuments.ucsf.edu/docs/tmhd0001

A Tobacco Industry Research Committee, sometimes referred to as TIRC, phonetics, as if you were just -- that is, one word.

Q And TIRC -- did TIRC hire the Hill and Knowlton Company?

A Well, I'm not sure exactly what the contracts look like, but when all of these people came together, they formed this organization called TIRC. And so my guess is that Hill and Knowlton probably did have a contractual relationship with TIRC as opposed to with individual firms.

Q And when did all this first happen?

A In December of 1953 -- well, just prior to it. The first big meeting was at the Plaza Hotel just prior to Christmas of '53.

Q All right, sir. And this was December '53, Plaza Hotel. Now what had triggered this meeting?

A There had been some medical reports surfacing in the news that was causing them to be fearful that the public might start to shy away from cigarettes.

Q And did the heads of the major tobacco companies meet at the Plaza Hotel in 1953 to put together a strategy which included the TIRC?

A Yes. The TIRC was the organization that emerged from that meeting.

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Source: http://www.tobaccoindustrydocuments.ucsf.edu/docs/tmhd0001

Q And this group, Hill and Knowlton that we are talking about, were they hired -- I don't mean to be repetitive, but why were they involved?

A Well, they were the public relations firm or, as we now know them, the sort of spin doctors. They were the ones helping to form up this strategy and to guide the behavior and, actually, they were the force that staffed the TIRC in its early days.

Q So what was the significance of finding the papers from John Hill of Hill and Knowlton about this enterprise, this organization?

A It exposed for the first time the inner workings of this TIRC.

(Change of reporters, 12:00 p.m.)

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(Change of reporters at 12:00 noon)

Q Now, let me be -- and we're going to talk about it in detail, but why should anyone care today what happened in 1953. It seems too long ago to make any difference. Why is it important?

A Well, it's certainly important in cases like this where the plaintiff began smoking back then. TIRC, as that entity, continued for the better part of a decade, and then it was restructured and broken up into two organizations, the Tobacco Institute to handle the lobbying and publicity activities, based in Washington, and the Committee for Tobacco Research, CTR, based out of New York. So they broke off the sort of scientific activities from the lobbying and purely public relations activity.

Q Well, did the influence of the TIRC, was that felt throughout the decade of the 1950s?

A Through the '50s, and many of the strategies adopted then persisted well into the modern era.

Q And did the agreements reached in the strategies used in the TIRC, as agreed to in the 1950s, did they affect consumers perceptions of cigarettes throughout the 1950s?

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A Yes. They colored the news that consumers did or did not receive.

Q And how about the 1960s?

A Yes.

Q And the 1970s?

A Yes.

Q And even into the 1980s?

A Yes.

Q So what was done back in the 1950s, did that have an effect on consumers in general for many decades?

A It's had an effect on consumers and indirect -- or as intermediary to that, effect on the media, and the media, quality of the media coverage on scientific community, on the doctors and their attitudes and knowledge and so on.

Q Well, we'll cover that in more detail.

Now, I see something here called the Frank Statement or "A Frank Statement." The jury has already seen, and it has been marked into evidence, a document called "A Frank Statement to Cigarette Smokers." Did that come out of this meeting in 1953 with the TIRC?

A That was the first concrete action that the public saw was the publication of this Frank

Statement early in January of 1954. So this TIRC

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body had managed to be productive over the Christmas holidays and from the time of its meeting to kind of draft and get approved and published this Frank Statement.

Q And this -- but tab No. 1, is that from the time when they had not yet published the Frank Statement?

A I don't have tab one in front of me. Oh, you gave it back to me. And we'll have a copy when we're -- after lunch, so I didn't mean to ask you a trick question.

(Witness reviews document)

Q Well, let me help you. I don't think there is a separate date.

A Yes. I was just seeing if there was any date or any reference to previous activities, and I don't see any, so I take this to be a very preliminary document, that is early in the planning process prior to the publication of the Frank Statement.

Q Okay. And let's go on then on page two, and we'll read one paragraph, the first paragraph, and then we'll move it along. All right, The attitude of the men we must directly deal with in

the industry -- I think I read part of this -- is interesting and important for us to understand. That is why notes on the four interviews with the

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research director are given in some length. You'll get little information about lung cancer, pro or con, but you'll find some mighty interesting opinions.

"One of the men said it's fortunate for us that cigarettes are a habit they can't break. Said another, boy, wouldn't it be wonderful if our company was first to produce a cancer-free cigarette. What we could do to competition. Said another, suppose everyone smoked just one cigarette less a day, that would be maybe 40 billion a year."

And again, quote, "The stock market fall was terrible, but you will remember dividends are going to be much larger next year without the EPT."

And I don't know what the -- do you know what the EPT is?

A No idea.

Q Well, what is the point of the recitations of these industry officials on Hill and Knowlton?

A Well, it seems to be internally an acknowledgment that there is this cancer issue and that there is both problem and opportunity; that if

there is a public relations problem and there's a competitive opportunity, if one of the firms could solve that problem.

Q And was there, in your opinion, after having read all of these documents, a feeling that there was some crisis in the industry?

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A Yes, definitely. It was referred to in the industry as the health scare.

Q And how, just giving us the big picture in advance, how did the industry meet with the health scare?

A Well, there was this collusion between competitors. They've gathered and they've formed common policy, a common front; were to manipulate public opinion, the attitudes and knowledge of doctors, and ultimately the public.

Q Was it primarily through public relations or primarily through science?

A Primarily through public relations.

Q Now, let's go on to the next paragraph: "At the moment these men" -- who I take it -- who does that mean, "these men"?

A I think that is referring to the research directors they had interviewed in the previous paragraph.

Q "At the moment these men feel thrown for a loop. They have competed for years, not in the price, not in any real difference in quality, but just in the ability to conjure up more hypnotic claims and brighter assurances for what their own brand might do for a smoker compared to another brand."

Do you understand what they are talking

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about?

A Yes. They are talking about the advertising activity, that the products differ in image, but not really in substance; that there is no real difference in quality. There is no real price competition, but there is an appearance of difference because of the advertising activity and its, quote, "hypnotic claims and brighter assurances."

Q And then they go on to say, they talk about Walter Winchell told his audience, the nature of this fact in brief words. "The burden of proof has shifted. It is no longer up to the scientist to prove that cigarettes cause cancer. It is the duty of all concerned to prove that they do not. And this, of course, is exactly what no individual in the whole world can prove at this juncture. And

until that proof comes in some form, arguments over the logic of some scientist and criticism of his particular ideas of cause and effect can neither -- can satisfy neither scientist nor public, nor get anywhere," and I guess that's a period over there.

What did this -- what was your understanding from this paragraph?

A That they didn't have evidence to directly contradict the cancer story; that they couldn't disprove it, and that the best they could do was to create the appearance of a controversy, create seeds

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of doubt.

Q And is this a technique that was used in their public relations for years?

A Yes.

Q And does it continue to be used today?

A Yes. The controversy position has been a persistent one.

Q Explain what you mean by the controversy position.

A To create the appearance that scientists disagree about the medical consequences of smoking, whether that's lung cancer in these days or the effects of secondhand smoke or the effects on heart attacks or even, for that matter, the effects of

advertising.

They'll -- the industry strategy is to define people who will argue against that and to say that, well, there is not enough evidence that we could really draw a conclusion. In the meantime, the implication is that smokers can go ahead and smoke; that there is no -- insufficient evidence to justify any particular action.

Q Well, why as a public relations purpose -- I mean, looking at this as an expert in communications, why would anyone -- why would it be a legitimate goal to say that there was a controversy?

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A Because that leaves doubt in everyone's mind as to what they're hearing, whether it's fact or just rumor. If they hear from some, apparently, authoritative source, like a science article in a magazine, that there is a controversy or their doctor says, well, there is still some controversy, then that lets the average person off the hook in a psychological sense. They don't feel that they have to take action. They feel like there is, you know, there is still research that needs to be done before they know for certain whether I need to stop smoking or change my style of smoking.

Q Okay, and let's --

MR. WILNER: Your Honor, it may be a good time to --

THE COURT: Do you want to approach the side bar. We don't need the court reporter.

(Side-bar conference held outside the hearing of the jury)

THE COURT: Ladies and gentlemen, we're going to break for lunch at this point. It is ten after twelve. I'm going to ask you to be in the jury room at 1:20, which gives you an hour and ten minutes.

Please do not discuss the case among yourselves or with anyone else. And if you're in the jury room at 1:20, we'll be able to start right on time.

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THE BAILIFF: This court is in recess until 1:20.

(The proceedings were adjourned for lunch at 12:10 p.m., to be reconvened at 1:20 p.m.)

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 97-03522-CA

DIVISION: CV-H

ANGELA B. WIDDICK, as Personal Representative of the Estate of ROLAND E. MADDOX, deceased,

Plaintiff,

vs.

BROWN & WILLIAMSON TOBACCO CORPORATION, a foreign corporation; LIGGETT GROUP, INC., a foreign corporation; and WINN-DIXIE STORES, INC., a Florida corporation,

Defendants.

AFTERNOON SESSION

Monday, May 18, 1998

http://legacy.library.ucsf.edu/tid/tmh05a00/pdf
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VOLUME VI

- - -

ACCURATE REPORTING SERVICE OF JACKSONVILLE, INC.
501 West Bay Street, Suite 150
Jacksonville, FL 32202 (904-355-8416)

Wednesday, May 18, 1998 1:20 p.m.

P R O C E E D I N G S

MR. BACKER: This court is back in session. Please be seated.

THE COURT: Mr. Wilner, how are we doing timewise?

MR. WILNER: We're doing okay.

THE COURT: Are you ready to proceed?

MR. WILNER: Yes, Your Honor.

THE COURT: Mr. Riley?

MR. RILEY: Yes, Your Honor.

THE COURT: Bring them in, Mr. Backer.

(Jury enters courtroom)

THE COURT: All right, Mr. Wilner, you may proceed.

DIRECT EXAMINATION (Continued)

BY MR. WILNER:

Q May it please the Court.

Dr. Pollay, we're going to continue going through some of these papers that you -- that we've been talking about on Hill and Knowlton to

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understand how the initial meeting was done and what followed it. And I've taken the liberty of redrawing this chart so that we can see it a little better without the difficulties in color. So is

this a little more visible about what we have here?

A Yes. It seems that the only changes are just the removal of the color.

Q Okay. And, again, what we're talking about now is the documents that came from Mr. Hill who was hired by the TIRC. So with that preface, let's return, if we could, to the first document on page four.

A I need a binder.

Q You do, indeed. And let me direct your attention to document number one on page four. This is the same document that we were looking at earlier.

A Yes, it is.

Q And it says, problem number one, problem one, the very first problem is to establish some public confidence in the industry's leaders themselves so that the public will believe their assertions of their own interest in the public health.

Now from a public relations point of view, why was that important?

A It's called source credibility, that is,

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it's always helpful to establish that the spokes-person is someone who can be believed. So they need

to try and make the CEOs look sincere.

Q And this document has been marked in evidence. This is the Frank Statement to Cigarette Smokers?

A Yes, it is.

Q You're familiar with that, of course?

A Yes.

Q And was that the product of these meetings that we're talking about and will continue to talk about?

A Yes, that was the very first product.

Q And let me direct your attention to the language in here that says, We accept an interest in public health as a basic responsibility paramount to every other consideration in our business.

A Yes. And that's signed by all of the participating parties.

Q So, in your expert opinion, was that statement the result of this agreement to establish public confidence in the leaders so that the public will believe their assertions of their interest in public health?

A Yes, that in the formatting of putting explicit signatures at the bottom, I mean, not the handwritten signatures, but the identifying all the

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participants by name.

Q Problem number two is to reassure the public and still instinctive fears in this interim when definitive facts giving complete assurance are still lacking, and scientific doubts must remain, and when new unfavorable information can emerge from some laboratory at any time to act as a bombshell on the whole tobacco industry if it has meanwhile tried to pooh-pooh the unfavorable findings to date.

From a public relations point of view, what does this mean to reassure the public?

A Essentially to convey to them that they don't need to take any action yet, that the industry is going to look into it and will let them know when there's anything definitive.

Q And let's look at page five at the top of the page. I want to ask if this is what you mean by that.

The fact is, of course, that no one who has been a heavy smoker is going to benefit himself by falling into a panic and eliminating the pleasure and comfort of cigarettes. He might just as well go on enjoying his smoke in this interim while research pursues the facts, with full assurance that if any cancer-causing agent is ever really found in

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tobacco, the manufacturers will quickly find a way to eliminate it.

Now, is that what -- in your expert opinion when they say "reassurance," is that the kind of idea they're talking about?

A That's what they want the consumers to conclude.

Q That it is -- there's no reason to quit, that if something is ever found to be wrong, that the manufacturers will fix it?

A Yes. That you might as well go ahead and keep smoking, there's not enough evidence yet. If there is evidence, the industry will be alert to it and correct it.

Q How effective in getting that message across to the public was the industry in the '50s and the '60s and the '70s?

A I think it was very effective by a number of standards. The primary one that I look at is the bottom line one, is their ability to maintain sales and profit. And they, except for a momentary kind of blip in the sales activity here and again when the Surgeon General's report came out, they were able to kind of sustain the momentum of the marketplace.

Q Problem number three, how do validate this message of assurance. The men talked to in the

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cigarette companies tend to, (A), think occasionally in terms of trying to smear the personal responsibility, motives, judgments or techniques of Wynder.

Do you remember who Wynder was?

A Yes, one of the researchers.

Q And others supporting him. It says, that this approach would not be most dubious. (B) to believe the scientific case will be arguing -- to believe the scientific case can be arguing in the public arena by leading the laymen through the elaborate statements which only specialists are really qualified to weigh and debate in their own scientific councils. For the quest of ultimate causes behind known effects is the specialists' job.

I don't really understand that. Can you translate that.

A I think what they're talking about is one alternative approach which they don't really adopt, is to get into the thicket of all of the scientific mumbo jumbo and really kind of try and educate the consumers to follow the complexities of those arguments.

Q And, in fact, did the TIRC send out information or mumbo jumbo to physicians to try and persuade them?

A Physicians were one of the target

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audiences for the activity.

MR. RILEY: Your Honor, I object to the characterization of mumbo jumbo. This is not a medical doctor.

THE COURT: I'll sustain the objection.

MR. WILNER: All right.

Q Did they send out, quote, "information," unquote, to medical doctors?

A Yes, they did.

Q And then (C) is, To overlook the fact that in this particular instance -- scoot that up a little. To overlook the fact that in this particular instance, the stakes for the public are even larger than to overlook the fact that in this particular instance the stakes for the public are even larger than for the tobacco manufacturers.

A Yes, this -- the top sentence appears, it says the men talked to in the cigarette companies tend to overlook this public interest because they're preoccupied with their own corporate interests.

Q What does it mean when it says the "stakes for the public are even larger than for the tobacco industry"?

A Well, there's a real cancer problem. That's more serious to the public than is the profit problem for the corporation.

Q When the -- based on your evaluation of

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all these -- well, let me go on then I'll ask you again.

For the public in an issue touching the deepest of human fears and instincts it evolves, the issues of uncontrollable disease and death; hence, cigarette companies might not readily be forgiven if their approach to this problem is stemmed only from eagerness to protect their earnings, and if they twisted the research of medical science which seeks to save men into a device to save stockholders. There is no precedent when a great industry has been forced to face such grave issues.

A little bit hard to understand what they're getting at, but would you translate as an expert.

A Well, I think it's the same theme that was begun earlier in the paragraph that, you know, we've got to be -- that the people in the industry have a

tendency to be preoccupied with their profitability and not with the public health. And that's going to be a problem for us in the public relations handling of that. And that will really be a very serious problem as, you know, as it comes to light.

Q Did the public relations activities keep claiming that the industry was interested in public health?

A As you saw in the Frank Statement, they

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claimed that that was the predominant or paramount concern put above their interest in profit.

Q And did you find the roots of that as a public relations technique in these documents?

A Well, I think that's the theme of this paragraph here.

Q In the past, industry has given little twists to the facts of science, to convert them into sales propaganda without such risk.

Then it goes on and it says, Cigarette industry has indeed been doing this for years.

What does that mean, "twists to the facts"?

A Well, this is in reference to the advertising activity from the '30s and '40s, a few examples of which we saw this morning. And, you

know, how in those ad campaigns they talked about scientific evidence, will not cause irritation and so on. And I guess a twist to a fact is, you know, a half truth or distortion of the truth or something like that.

Q And (D) says -- and all of this is part of the sentence, let me represent to you that begins, The men we talked to in the cigarette companies tend to do all these things. One is -- the last is (D), to assume that agents like science writers can be guided or encouraged to disseminate special, quote, "interpretations," unquote, of current findings, in

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ways that would blame lung cancer on everything else but cigarettes. Or, even better, in ways that would throw doubt on the validity of statistics, showing great increases in lung cancer.

If the issue were merely cough or sore throats or warts, this might work. There is serious question as to whether anyone after due reflection would consider such a course useful for long-term purposes in the present circumstances.

Let me ask you, did, in fact, the TIRC after this meeting disseminate special, quote, "interpretations to science writers to blame lung cancer on everything else but cigarettes"?

A Yes, science writers are one of the very specific target audiences.

Q And did they -- did they do it in ways even better in ways that would throw doubt on the validity of statistics showing great increases in lung cancer?

A Yes, and to make sure that the stories favorable to the industry were well covered.

Q And so what -- is it your idea that whatever happened in this meeting, that the cigarette -- the men in the cigarette companies that tended to do this, that it was their policy that was ultimately followed?

A Yes, and that their assumption that

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science writers could be influenced, I think, was ultimately upheld, although it took a steady effort over several years.

Q Problem number four, we must early decide on our own attitude towards the findings of men like Wynder, Rhoades, Ochsner -- do you know who Ochsner was?

A He was another one of the lung specialists.

Q -- et al. We have a choice as previously indicated of smearing and belittling them, trying to

overwhelm them with mass publication of the opposed viewpoints of other specialists, debating them in the public arena, or (D) we can determine to raise the issue far above them so that they are hardly even mentioned, and then we can make our real case.

Q What did they do with Wynder and Rhoades and Ochsner?

A Well, they did some of all of this. I mean, like the belittling, they would take -- make positions like mice don't smoke, so what is the relevance of all this, the fact that mice get cancer when painted with cigarette tar.

Q So did you find then in this first document the plan for how the public relations was carried out over the next 30 years?

A Yes, the seeds for that. I mean, it takes shape as it evolved, but you can see the seeds here.

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Q Let's look at document two and we'll move a little faster.

This is document called Background Material on the Cigarette Industry Client, and the date, Ginny, is December 15, 1953. And this is written by someone at the same place, is it?

A Yes, Burt Goss, one of the staff of Hill and Knowlton.

Q I'll just -- we'll just try to move a little faster through this. I direct your attention to: The group was called together by Mr. Paul -- I think they misspelled his name. It's Hahan but his name is spelled H-a-h-n, I think but they called H-a-h-a-n.

Paul Hahn, president of the American Tobacco Company. The chief executive officers of all the leading companies, R. J. Reynolds, Philip Morris, Benson & Hedges, U.S. Tobacco Company, Brown & Williamson, have agreed to go along with a public relations program on the health issue. Do you see that?

A I do.

Q Now, when you helped me put this chart together, we didn't list every single one of those people who were at this meeting. Was that for space reasons?

A Yes. And there's been some subsequent

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mergers. Benson & Hedges has been folded into Philip Morris, the modern Philip Morris.

Q But, in fact, were all these players present at the meetings of the -- of the meeting at the Plaza Hotel, and did they continue to provide input and verification for what was going on here?

A Yes.

Q And how long did the TIRC continue to receive input and, just roughly, not an exact date, but was this something that only went on for a week or did it go on for many years?

A Oh, no, it was the better part of a decade into the early '60s, and then it's restructured into the Tobacco Institute and the CTR.

Q Since we took the color out of the charts, is the -- this is the Tobacco Institute down here?

A Yes.

Q And this is the CTR over here?

A Yes.

Q And you've linked these with an arrow that goes where?

A Goes back to the TIRC. These are sort of the offspring, if you will, of TIRC. TIRC gets restructured and in high -- broken up into these two component parts of the Tobacco Institute and CTR.

Q And, in fact, I'll represent to you so we don't cause any confusion, that American Tobacco was in the Tobacco Institute from '58 to '66, then they

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were out for a while. I don't remember if they went back in. Just so we're all -- so there's no suggestion that we're saying anything wrong here.

And that they were in the CTR for the entire time that it existed. Now, as of today, is there still a CTR?

A As of today, its future is uncertain.

MR. RILEY: Your Honor, can we -- I'm not sure what the question was there. We had a long speech.

THE COURT: Well --

(Side-bar conference held outside the hearing of the jury)

THE COURT: I'm not sure what the objection is.

MR. RILEY: My objection, Your Honor, is simply that I'd appreciate it if counsel would stop testifying and if we could have questions to the witness and answers.

THE COURT: It's leading then?

MR. RILEY: I'm not even sure if it was leading. It was just a speech, Judge.

MR. WILNER: Let me just say something in my defense. I've bent over backwards to bring up American's point that they were not in the Tobacco Institute at all times. I did that as an officer of the court so there would be in no misunderstanding.

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So I apologize for doing it, but I was doing it as,

you know, just in an abundance of caution that no one would think that necessarily we're implying that they -- I mean, for God's sake, I did that deliberately to help you.

MR. RILEY: Judge --

MR. WILNER: I did --

MR. RILEY: That's not the only time. I just would appreciate if we would have questions and answers.

MR. WILNER: I'll try. I mean, I really didn't think that was improper since it was getting some of the fundamentals --

THE COURT: I don't make the rules, Mr. Wilner. I just enforce them.

MR. WILNER: I understand.

THE COURT: So if the objection is that you're leading the witness, I think you certainly were.

MR. WILNER: Okay.

THE COURT: So I'll sustain it.

MR. RILEY: Thank you, Judge.

(Side-bar conference concluded; proceedings resumed before the jury)

Q Just to put this in context, the TIRC -- go back up a little bit. Was that the one that was

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first created by all these companies?

A Yes.

Q And then did that become later the Tobacco Institute and the CTR?

A Yes. I mean, there's a -- I can't recall the exact time. Tobacco Institute activities start to take a life of their own, and there's a presence in Washington because of what's going on there. And I forget the date at which the Tobacco Institute becomes formally instituted.

Q What is this thing, the SAB?

A That's the initials for the Scientific Advisory Board, the people working with TIRC to oversee the distribution of funds or, at least, some of the funds in the research activities they were supporting.

Q Let's go to page two of number two, and down in the second paragraph it says, The industry's position. Then down here, skimming over some of this in an interest of time, they feel that they should sponsor a public relations campaign which is positive in nature and is entirely pro cigarettes. They are confident they can supply us with the comprehensive and authoritative scientific material which completely refutes the health charges.

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Now, from your reviewing all the documents here, was any evidence that refutes the health charges ever provided?

A Not that I've seen.

MR. RILEY: Your Honor, I think this is beyond the witness's expertise.

MR. WILNER: We're asking him from what's in these documents.

THE COURT: Are you talking about to Hill and Knowlton?

MR. WILNER: To Hill and Knowlton.

THE COURT: By the tobacco companies?

MR. WILNER: That's right.

THE COURT: I'll allow that.

Q Was it that you found in any of these documents that you looked through?

A No, I've seen no absolute refutation of the health charges.

Q The next paragraph says, They are emphatic in saying that the entire activity is a long-term continuing program.

What activity are they talking about?

A The public relations activities.

Q Since they feel that the problem is one of promoting cigarettes and protecting them from these

and other attacks that may be expected in the future. Each of the company presidents attending emphasized the fact that they consider the program

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to be a long-term one.

And was it a long-term one?

A It was a long-term one.

Q And we were a little unclear because in your last question, is the Tobacco Institute still around?

A The Tobacco Institute is still around.

Q Page four, Other information. The current plans are for Hill and Knowlton to serve as the operating agency of the company, hiring all the staff and disbursing all funds. The chairman will probably be Mr. Hahn or the head of one of the other companies resident in New York. There will be a strong subcommittee of chief executives all resident in New York.

Tommy Ross, counsel for American Tobacco Company, has almost completed a quote, "White Paper," on the scientific facts involved in the health issue, which he will make available to us for use or inclusion and something we will want to distribute to the press, magazines, et cetera.

Now, had they hired any scientists yet at

this time, December 15, 1953?

A No, they don't get around to appointing their scientific director until the next summer. And even the board members aren't appointed until late April, I think, of 1954, the scientific

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advisory board.

Q Now, are you familiar when it says the White Paper, are you familiar with what White Paper they're talking about about?

A I haven't seen the White Paper itself, but I believe that to be the source that led to the publication early that spring of the scientific perspective. It was a document published and distributed called the Scientific Perspective.

Q Okay, excuse me. Plaintiff's Exhibit 3, Public Statements, would you turn to tab six. Do you see the paper?

A Yes.

Q And is that called a Scientific Perspective on the Cigarette Controversy?

A Yes, it is.

Q And is that the paper that Mr. Ross was preparing at the time?

A I believe it to be so, yes.

Q And that paper, although it states, it

gives the various scientific arguments, your testimony is that that was done before this group had hired any scientists whatsoever?

A That's right. Neither the scientific advisory board or the scientific director had yet been appointed.

Q Number three -- I'm sorry, I'll get that back because it's kind of in the way. Thanks.

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Tab three of the Hill papers. First page, let me show you something. It's entitled Preliminary Recommendations for the Cigarette Manufacturers, December 24, '53.

Because of the grave nature of a number of recently highly publicized research reports on the effects of cigarette smoking, widespread public interest has developed causing great concern within and without the industry. These developments have confronted the industry with a serious problem of public relations. Obviously, that problem would be quickly solved if the adverse publicity would cease and people would stop talking about the whole matter.

Now, what does that tell you about the purpose of putting together the TIRC as an expert in the field?

A Well, that the way it can cease the problem is that as a public relations problem, not as a public health problem. They're not trying to solve the cancer question; they're trying to protect the industry's economic interests.

Q Not to belabor it, but if the problem would go away, if people would stop talking about it, what problem are they -- what problem do they mean?

A Well, the problem of consumer awareness or

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consumer suspicion, if people were kept in the dark, then we wouldn't have a problem.

Q And would the cancer go away if the people would just stop talking about it?

A No, of course not.

Q Page two. And I won't belabor this. The Recommended Approach -- and I'm sorry, it's conservative and long range, and then the next paragraph, two paragraphs down.

The Underlying Purpose. The underlying purpose of any activity at this stage should be reassurance of the public through wider communication of facts to the public. It is important that the public recognize the existence of weighty scientific views which hold there is no

proof that cigarette smoking is a cause of lung cancer.

Again, based on just your review of the Hill and Knowlton documents, had anyone given any weighty scientific views that were known to Hill and Knowlton at that time?

MR. RILEY: Your Honor, the same objection.

MR. WILNER: I'll rephrase it.

Q I didn't mean known to Hill and Knowlton, since we can't get into their mind. Did you see any evidence in the documents that you have before you of weighty scientific views which -- and let me

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quote exactly here, weighty scientific views which hold there is no proof that cigarette smoking is a cause of lung cancer?

MR. RILEY: Your Honor, it's beyond the witness's expertise.

THE COURT: I think the question was, is there anything in those documents that he saw.

MR. RILEY: May we be heard?

MR. WILNER: Your Honor, I'll withdraw it. We just need to move on.

Q Page four is Public Statements by Cigarette Makers. The first public statement of the

committee should be designed to clarify the problem and to reassure the public that the industry's first and foremost interest is the public health, (B), that there is no proof of the claims which link smoking and lung cancer, and, (C), the industry is inaugurating a joint plan to deal with the situation.

The statement should be distributed widely as news and to employees, stockholders, distributors, tobacco growers, dealers, suppliers, public officials, national and community leaders, and other groups, placed as an advertisement in leading newspapers and in leading news magazines. The draft of suggested copy statement is attached.

And did that become the Frank Statement

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all over the country?

A Yes, it did, published about two weeks later.

(Change of reporters, 1:50 p.m.)

Q Did, in fact, as it suggests here that the industry is aggregating a joint plan to deal with the situation, was all of this a joint industry effort?

A Yes, it was a conspiracy of these competitors.

Q On the next tab, bear with me, is tab five, which is January 15th, 1954. Now, just moving along in time, this says, Progress report, the committee statement entitled a "Frank Statement to Cigarette Smokers" appeared in 448 newspapers reaching a circulation of 43,245,000 in 258 cities.

This included, with very few exceptions, all cities of 50,000 or more in population, plus all plant or headquartered cities of committee members and then they go in and say total costs and so forth and so on.

Was that a widespread publication for the

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time?

A Yes, very widespread.

Q Does the publication of such -- of this and similar things, in your expert opinion, have an effect on consumer expectation, even among people who don't actually see it?

A Well, indirectly, yes, because it

influences public opinion. It would influence, for example, doctors and what doctors might give as advice to their patients.

It influences friends and neighbors. So even if you didn't see it yourself, you might hear about it from a friend or a neighbor.

Q Page two, press release and press coverage. A press release announcing formation of a committee was given national distribution and was widely covered by newspaper, radio, TV, and magazines.

The editorial comment was most favorable with editorials still being received from all over the country.

And at the bottom of the page, White Paper, and I'll ask you on both of these. A draft of the White Paper was submitted to the research director's advisory committee and suggestions from these officials are being coordinated into a revised draft for final clearance.

Is there any evidence in any of these

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papers that any group of physicians was called in to give a scientific opinion on any of the stuff that was going on?

A Not that I see. These research directors are the research and development directors from the

corporate participants, not from independent scientific advisors.

Q And does that include Mr. Irwin Tucker?

A I believe it did, yes.

Q And was he one of the people who attended these meetings, the meeting at the Plaza Hotel?

A I believe so. If not, he was certainly one of the ones consulted when they talked about consulting with the research directors.

Q Please turn to tab 8. Now, did the -- how did this coverage begin to evolve? And in answer to your or to -- that was my lead in to this, to number eight. So let me -- I'm going to ask you that after we review the documents.

This is February 18, 1954, one month later. It says, Attached is a summary of a detailed breakdown of coverage in all media to date on the TIRC.

Now, let me stop and ask you, was it just the Frank Statement or were there lots of articles that talked about the formation of the TIRC?

A Oh, there were a number of articles about this event and then in other articles about, you

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know, the financial state of the industry and other stories, you know, from the ongoing flow as might

have existed from scientific news and so on.

Q So the next page shows an analysis of coverage in newspaper trades and radio and television, unfavorable stories.

It says tobacco critics publicity, what does that mean?

A That means the stories reporting the research of people like Wynder and Ochsner and people of that nature.

Q So there were stories which reported that cigarettes were dangerous?

A Yes, there were some.

Q Then those they call unfavorable stories?

A Yes.

Q Then they have favorable stories, including syndicated serials by INC or INS, I can't read it. Scripts Howard, New York syndicate and AP.

So what do they mean? If unfavorable stories are the ones that say cigarettes are dangerous, what are the favorable stories to them?

A Ones that exonerate cigarettes and -- at least put considerable doubt on the validity or the conclusiveness of the studies. And the syndicated serials are those things appearing in multiple newspapers, that is distributed on a national basis.

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Q And how many favorable stories that did not say that cigarettes were dangerous or at least did not take the view of the unfavorable stories?

A Fifty, almost twice that of the critical stories.

Q Now, what would be, in your expert -- in your expert judgment, what is the effect on consumer expectation when you have stories -- when you have a mix of stories like this?

A It would leave consumers in doubt, and that they're twice as likely to see stories exonerating the industry as stories critical of the industry.

Q And then, furthermore, on down a little bit to American Cancer Society and U.S. Public Health Veterans Administration Publicity.

Now, in opening statement counsel for Brown & Williamson mentioned communications by the American Cancer Society on the issue of smoking and health.

How many did this enumerate in this time period?

A In this time period, there were only three such stories found.

Q But the American Cancer Society and others did from time to time put out stories that were, that were critical of or that -- that tended to prove the

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health -- adverse health consequence of cigarettes, or did they?

A Yes. Well, yes, from time to time. And of course, the tone and conclusiveness of those has evolved over time as well.

Q How did the resources of the American Cancer Society, in terms of being able to bring out their message, compare with the resources that were being put into this message?

A They were modest, to say the least. They did not have the likes of Hill & Knowlton and this scale of this sort of public-relations activity.

Q Yet, today, almost everyone believes, I'll represent or assume -- let me ask you to assume almost everyone believes that cigarettes are harmful.

How come -- first question, based on that premise, has that always been the case?

A No, that has not always been the case.

Q And why has it not always been the case?

A Well, there's been a growing amount of evidence and growing amount of learning by successive generations of people taught in school systems and so on, so that this generation is better informed than previous generations.

Q Why wasn't it -- why didn't everyone understand it as soon as Wynder's and Graham's

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results were published in 1954? Why didn't everybody know that that was the -- that was the deal.

MR. RILEY: Your Honor, I object.

THE COURT: I'll sustain the objection to the form of the question.

MR. WILNER: Okay.

Q Why didn't, in your expert opinion, why didn't all -- did all consumers, or did consumers in general know that cigarettes caused cancer as soon as Wynder published?

A No, they did not.

Q Why not?

MR. RILEY: Your Honor, objection.

A At the most they would have heard an allegation --

MR. RILEY: Objection, Your Honor, leading.

THE COURT: I'll allow it over the objection.

A At most, they would have heard an allegation and there -- as we have seen from some of these data, they're far more likely to have seen stories casting doubt upon the validity of those conclusions.

And, of course, in addition to that, they would have been subject to a variable barrage of advertising in support of cigarettes as safe.

Q But many people understand -- let me ask

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you to assume that many people believe that they've always thought that cigarettes were bad, that they didn't even have to learn it anywhere. Let me ask you to assume that, whether it's true or not.

In view of -- if you assume that, is it -- is the understanding -- is the belief that cigarettes are in some way bad for you, to a public relations expert, the same as having a belief that they -- that they cause cancer.

MR. RILEY: Objection, Your Honor, no foundation.

THE COURT: I'll sustain the objection to the form of the question.

MR. WILNER: I'm sorry, I didn't hear the last.

THE COURT: To the form of the question.

MR. WILNER: The form, okay.

THE COURT: I don't think there is a foundation for that question with this witness.

MR. WILNER: Let me try again.

Q Are you familiar with the type of

information that is -- that has been conveyed to consumers about cigarettes?

A Yes.

Q And if consumers were to understand that cigarettes at one point in time, let's say the 1950s or the '60s, were bad for them in an unspecified way, can you account for that based on the information

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that was supplied to them?

MR. RILEY: Objection, Your Honor, no foundation.

MR. WILNER: Never mind, I'll go on. I can't think of a good way to say it so, we will go on. I'll withdraw it.

Q Let's go to number nine. I'll try again later.

This is May 3rd, 1954, Tobacco Industry Research Committee, Report on TIRC booklet, "A Scientific Perspective on the Cigarette Controversy." Is that the same booklet I handed you before as tab 6 in the --

A Yes, is it.

Q It says a booklet, "Scientific Perspective on the Cigarette Controversy," was released April 14, 205,000 copies being printed. It was sent to 176,000 doctors, general practitioners and specialists. It

was also sent to deans of medical and dental colleges.

The booklet and the cover and press -- press release went to a press distribution of 15,000, included were editors of daily and weekly newspapers, consumer magazines, veterans magazines and medical and dental journals, news syndicate managers, business managers, editorial writers, science writers, radio and TV commentators, news columnists

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and members of Congress. Did you see that?

A I did. And I judge it to be quite important.

Q Is that what -- what it means to have a public relations campaign?

A This is a public relations campaign which is focused on what is called opinion leaders, that is people who, in turn, will influence public policy, what's covered in the media, what doctors are doing in giving advice to their patients and so on, rather than focusing it on the general public.

Q So if somebody says, Well, I never heard of this booklet, "Scientific Perspective to the Cigarette Controversy," because I never saw it, does that mean it didn't influence them in some way?

A Not at all, because it's likely to have

influenced the quality of the press coverage they saw, what advice they got from their doctors, what actions governments were taking at the time.

Q Just a few more and we will be done with this section. Number 12, and this is really a lead -- a letter with an attached memoranda. Let's read the letter first and then I'll -- part of the memoranda and we will go on.

This is August 17, 1954. So the TIRC has been in existence for, what, not quite a year?

A Yes, about six months.

Q And TV -- this is called, this is a report

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actually through July 31st. And the first sentence says, The attached report contains material that, as you will see, should be considered highly confidential and receive the minimum of circulation. And then it goes on.

And I'll ask you about the first page. Rather, let me -- I can skip that. Let's go on. In the interest of time, let me see if we can skip some of these. Bear with me one moment.

Okay, let's go to page six. As part of the work, building and maintaining of a TIRC library of basic information or material is in progress. Present materials include cross-reference index file

on medical and scientific papers on smoking and health, basic books, special files on pertinent press clippings, cross index card file on medical opinions, full text of speeches, announcements, panel discussions and similar material, data relating to other related phases of smoke and health obtained from other sources, and curriculum vitae of the scientific advisory board.

Is this public relations activity at its finest?

A Well, this is background to the activity that reaches out to the public.

Q Yes.

A This is scouring the universe of what is

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published and given in speeches in order to find seeds of doubt, which would then be reproduced and redistributed into the more general public.

Q Now, let me see if I've got this straight. If somebody were to make a speech in front of the Elks Club or something and say something, without a public relations firm to republicize it, would that typically get to the rest of the public?

A It's quite unlikely, unless a reporter happened to be in the audience and take a particular interest.

Q So what are they doing here in terms of promoting their public relations goals?

A Finding anything they can that might be beneficial to them and insuring that it does get into the publication stream.

Q Let's see, this says, General news releases, 11 general news stories have been distributed since the formation of the committee. In each instance, direct personal contact was made with all major news outlets in the press, radio and magazine fields to staff members in New York and field offices. An indication of the results has been included in the news summaries that are sent.

So what is this -- happening now? They're going -- they're making direct personal contact with major news outlets. Why do that?

A Well, again, to increase the likelihood

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that these stories get covered and get well placed, that is put in prominent locations in the newspaper or in the news or radio and television, things like that.

And by being based in New York, they have the advantage of being well networked, as we now say; that is, having friends and colleagues who are working in these various fields, working as

newspapermen, working in other media.

Q Page nine, Roman numeral three, Special Assistance to Press, Radio, Magazines and Others. This category might include many more items than those listed since there's been numerous telephone calls and personal contacts made of which the ultimate results are not yet known.

The following are some examples. Considerable source material was read and digested to provide facts for a column written by Hal Boyle, distributed nationwide by the Associated Press.

Special personal contacts are being made regularly with Time, Newsweek, U.S. News & World Report, Business Week editors to encourage the use of TIRC material.

Now, did -- in your expert opinion, did the -- did Hill & Knowlton do this as part of their public relations activities?

A Yes, they did.

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Q Did they do a good job?

A Yes, they did.

Q Through personal contacts, advanced information was obtained that a prominent magazine intended to report a growing lack of interest in the TIRC program on the part of participating companies.

This reference was removed from the story when the facts were brought before the magazine editors.

Now, did the -- in the process of trying to get the TIRC's information out, did the Hill & Knowlton people and TIRC people try to persuade the newspapers and periodicals not to run stories that were critical of the industry?

A Well, this is the --

MR. RILEY: Your Honor, I think that mischaracterizes what the document says.

THE COURT: All right.

MR. WILNER: I'm asking in his expert opinion. I didn't ask him to characterize anything. I said in his opinion is that what happened.

THE COURT: All right.

THE WITNESS: Yes, that is my opinion.

THE COURT: I'll allow it. If you want to be heard.

(Side-bar conference held)

THE COURT: I couldn't figure out if you were arguing --

MR. RILEY: The document says this

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reference was removed from the story when the facts were brought before the magazine editors. Mr. Wilner has shifted that to making it sound as if the story

was removed, when in fact all that was removed was a reference and not the whole story.

In fact, the suggestive story was run because the reference was removed from the story to suggest there was a story.

MR. WILNER: That isn't what I was talking about, Counsel. I'm entitled to ask him a question. He gives an opinion. We are going to prove that opinion with other references. So I wasn't just stuck on that one thing.

THE COURT: I'll allow it over the objection.

(Side-bar conference concluded)

Q Dr. Pollay, did the TIRC people go to their friends in the media and try to persuade them to go gentle on the cigarette industry?

A Yes.

Q Look at number four, By personal contact, advanced knowledge was obtained of a story on smoking by Bob Considine for Cosmopolitan Magazine, information was supplied regarding seven revisions and five qualifying editions to the story which was already entitled.

Now, what does that mean?

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25 A That they didn't even have to react to

1 something after it was published. They were able to
2 get in, in a timely way, before it was published and
3 get their revisions in place to minimize the damage
4 rather than try to undo the damage after the fact.
5 Q Now, was Hill & Knowlton only working for
6 the cigarette industry at that time or did they have
7 other accounts?
8 A They had other accounts.
9 Q Did they have these relationships with the
10 press and with the -- and with others, but certainly
11 personal contact with the -- with people who wrote
12 for the media as a result of longstanding
13 relationships with them?
14 A Yes, they did.
15 Q And in your opinion, did they use those
16 relationships to suggest that the media not write
17 cigarette -- stories which could, which could suggest
18 that smoking cigarettes was bad?
19 A That, and to make sure that the industry
20 side of the story was well-covered, to include the
21 industry spin.
22 Q Now, to be sure, there were stories that
23 came out that did say that cigarette smoking was
24 harmful?
25 A Yes, there were some.

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Q Was it typical for those stories to have, at the end, some kind of a qualification?

A Well, not always at the end. Very often, they would include the industry rebuttal or reaction to that story.

Q And was that generally done through these personal contacts between the Hill & Knowlton people and the press?

A Well, and the material that these writers would have on file subsequent to these contacts.

Q Did the Hill & Knowlton people also support authors who were writing books that seemed to be promoting smoking?

A Yes, they did.

Q Look at number six. It says further research and assembling of material and personal conferences have been extended to Mr. Cooley to provide him requested aid in his writing of a 48-page, low-price book for newsstand sales, and then something about the title, and angled at the idea you don't have to give up smoking. Fawcett Publications is issuing the book entitled Smoke Without Fear in late August and early September.

Does that support your opinion that they were actually going to people and trying to get them

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to write pro-smoking books?

A Yes.

Q On number -- let's look at number nine. Let's look at number seven. Personal discussions with editorial writers and the supplying of material preceded the appearance of several positive editorials in the New York Daily News.

What is positive to TIRC?

A Casting doubt on the cancer stories and supporting the industry's behavior.

Q Several other editorials which have appeared in newspapers throughout the country were the result of information provided by mail or through direct personal contacts by branch office staff members. Editorials in the influential Washington papers are an example.

Is that another example of that, of the kind of influence that the TIRC provided?

A Yes, it is.

Q And then number nine, two editorials widely used in hometown dailies and weeklies throughout the country were prepared for and then distributed by the U.S. Press Association. These were "The Same Ole Culprit" and "Truth Makes a Slow Crop." Over a hundred clippings of these have already been

received.

Do you know about "The Same Ole Culprit" argument?

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A I haven't seen that specific article. But the hometown dailies they refer to are the rural papers, that is the small circulation papers in the smaller communities.

Q Did they also work on the media, the electronic media?

A Yes.

Q Look at page -- look at number ten. Through personal contacts radio and TV newsmen and commentators receive frequent information concerning TIRC's activities. Some were the results of such efforts shown in the press, radio, TV reports.

For example, Dr. Little -- and who is Dr. Little?

A He was the man ultimately appointed as the director of the scientific board; chairman of the board, I believe, may have been his title. I don't know, he was the senior scientific staff person.

Q Dr. Little, Little's press conference was recorded on film on NBC TV "Today" -- NBC TV and CBS TV syndicated newsreel, UP Movie Tone News.

Now, I haven't seen that in a long time.

What is movie tone news?

A Movie tone news, that used to be when you went to the movies, in addition to seeing the feature film you would see short subjects like cartoons and other things.

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And one of the short subjects was a newsreel; that is, clips not unlike the evening news of various events.

Q So did -- and this Dr. Little's press conference -- now, you've seen press releases from his various press conferences over the years?

A Yes.

Q And what is his general position about smoking and cancer?

A He was an advocate of what was called the constitutional hypothesis; that the problem wasn't with the cigarette, the problem was with the smoker, that some smokers were predisposed to be cancerous.

Q Let me just go on. And MGM "Telenews," both of which go to some 80 television stations.

Now, when is this, 1954?

A Yes, I believe that's right. The summer of '54, July of '54 or August of '54.

Q Was that a lot of television stations in 1954?

A That was. That would have been most of the major metropolitan markets.

Q Then it goes on to list all these different networks, which I'm not going to read in the interest of time.

Number 11, one negatively aimed program. And again, negatively means what?

A Critical of the industry in telling the

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cancer story.

Q One negatively aimed program, WKBT, which was being scheduled on the cigarette controversy, was postponed after discussion of TIRC facts.

Can you, can you interpret that as an expert?

A Well, that the story was killed. I mean, there were some people planning to carry a story and they abandoned those plans.

Q Another TV program, "Martin Agronsky," which did deal with the cigarette controversy, ended on a favorable note after conferences with producers and presentation of facts.

And what does that mean?

A That the nature of the editing and the presentation of the story was such that the bottom line, that is the conclusion, was favorable to the

industry.

Q Number 20, and I'm not going to read every one in the interest of time. But number 20, special conferences are held with APUP and INS science writers. These have been helpful in obtaining guidance on attitudes of writers and learning best sources of information from them and in learning best methods in supplying information to them.

Again, why reach out to the science editors, the science writers?

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A Because you want to have an influence on the way they're covering the story; not just today, but over the next several years, as long as they're in position.

Q Is this activity -- is this just selling cigarettes?

A Well, it serves the interest of selling cigarettes. It maintains the sale and profit of the industry. But this is -- I describe it as a PR smoke screen.

Q And the document that we're reading from, my copy is 24 pages, at least, right?

A Yeah.

Q Is it all similar about how they contacted different people in the press and so forth?

A Yes. It's quite a comprehensive discussion of the variety and scope of the activities in those early months.

Q And the other documents that we haven't reached yet, and we will only reach a few because of time, are they of similar character to the ones that we have read so far?

A Yes, they are.

Q For instance, let's just look at 13 for a second, and we won't spend any time on it, but just to -- just for the completeness.

Again, we see -- let me direct your attention to conferences with publishers.

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Conferences of major publishing groups in New York City were planning and carrying out for Clarence, Cook, Little, scientific director, and Timothy Hardman, chairman, Arthur Hayes-Solzburger, president and publisher of the New York Times, Julian Oxadler, vice president and general manager, Lester Markel, Sunday editor.

These are all people high up in the New York Times, are they?

A Yes, as high as you can possibly get.

Q And then they talk to the Hurst Consolidated Publications, William Randolph Hurst was

conferenced?

A Yes.

Q Who is William Randolph Hurst?

A He's the owner of the Hurst Consolidated Publications.

Q And what would be the purpose of going to Mr. William Randolph Hurst by people from the TIRC and Hill & Knowlton.

MR. RILEY: Your Honor, I object, calls for speculation.

THE COURT: I'll sustain the objection.

MR. WILNER: Yes.

Q As an expert, why would a public relations move -- why would it be a public relations -- what public relations goal would be served in going to

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William Randolph Hurst?

MR. RILEY: Your Honor, can we proceed at side bar?

(Side-bar conference held)

MR. RILEY: Judge, I'm concerned that the questions are extremely argumentative. And I hate to interrupt but I think that counsel is effectively arguing his case and I think it's inappropriate. I think he ought to be asking questions and answers to the witness. I don't think the witness -- leading

the witness is making it hard for the jury.

THE COURT: So your objection is leading?

MR. RILEY: He's leading.

THE COURT: I sustain the objection. Try not to lead and ask him the question.

(Side-bar conference concluded)

Q What goals would be served, what public relations goals or other goals served by going to William Randolph Hurst?

A By getting him on board, you can influence all of the output for all of the Hurst papers, as opposed to having to go around and convince each and every one of the reporters and science editors and so on.

If you get it to come down from the top that this is how we're going to handle the tobacco story, that's all you need to do.

Q And on page two, Edward R. Murrow

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Television Show. Who is Edward R. Murrow?

A Famous newscaster.

Q How important was his show?

A Very, quite influential, picked up nationally.

Q And then it says magazine articles and writers, Harper's. How important was Harper's?

A Harper's is influential among opinion leaders; that is, it's read by a fairly elite audience rather than a mass audience.

Q And the Washington Post, was that an important paper, page three?

A Yeah. That's arguably the paper with the highest level of credibility in Washington.

Q So let's go to number 14. Let me represent to you that the American Tobacco has -- has stated in essence that the tobacco industry research committee was primarily a research organization. And I'll ask you about that.

On -- would you look at page one of the document on November 24th, 1954, for Mr. John Hill, Re, Proposed Budget 1955.

Do you recall this document?

A Yes, I do.

Q And would you turn to three pages -- actually, it says -- it says page two, but it's the second page of the budget. So it's this page

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(indicates).

And tell us what the budget for the Hill & Knowlton public relations machine was for 1954. I think it's at the bottom.

A For 1954, which is essentially money

already spent or committed, the budget was $1,230,000.

Q Just so we're clear, based on your reading of these documents, did Hill & Knowlton have any scientists itself?

A No.

Q And then would you turn the page and see what the budget was for the scientific advisory board.

A Yes. The preceding page, is that what you're referring to?

Q I had it as the second page, which is --

A I see what you're looking at, yes. 1954 budget under research grants?

Q Yes.

A My copy is a bit hard to read, but it looks like 300,000.

Q Actually, mine looks more like 500-.

A All right. Maybe it's 500,000.

Q Because it says 576-, I think, after that.

A Okay.

Q Let's go -- please look at document number 18. Now, this is April 28th, 1955, Doctor. I call

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that to your attention.

What I want to ask you about -- and this is

a public relations report to the TIRC, April 28th, 1955. And the first sentence is, The foundation which the Tobacco Institute Research Committee has been building is gaining strength in both breadth and depth.

What are they talking about, what foundation?

A Well, their credibility among doctors among science editors, journalists generally.

(Change of reporter, 2:25 p.m.)

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Q The progress of the scientific program developed by the Scientific Advisory Board is an essential and prevailing force. The sound approach to the problem of a Scientific Advisory Board has encouraged other qualified scientists to speak out courageously in questioning those who would write off the lung cancer problem as a smoking problem.

On the second paragraph. Factors show improved position. Nevertheless, progress has been made. On the positive side, these factors stand out. One, the first big scare continues on the wane. What is the wane?

A Means it's diminishing. It's subsiding. It's going down.

Q There is much general awareness of the big "if" factors involved. Do you know what they are talking about?

A Yeah, the doubts that there is any cancer link, you know. The "if," I think, stands for all of the many reasons one might have doubts.

Q Next page, No. 4. There is greater and growing expression of the position that cigarettes do not and should not stand convicted. This is evident in both the scientific and lay communities.

Now, if you as an expert -- was the public

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relations campaign succeeding?

A Yes, it was.

Q No. 5, Treatment --

MR. RILEY: Your Honor, could counsel please read the conclusion of paragraph 4?

MR. WILNER: Sure. Suspicion is still widespread, but the lynching party seems to have been called off at least temporarily. No. 5, treatment of the cigarette health issue in the public media continues to improve from the Tobacco Industry Research Committee's point of view. Now, is that further evidence -- is that further evidence that the public relations is succeeding?

A They are having an easier time of it, getting the press to handle the story their way.

Q And this I want to read. Even adverse stories now tend to carry modifying statements. What is a modifying statement?

A That is the industry position or some qualification that more research is needed, this is not yet really conclusive.

Q Positive stories are on the ascendency?

A More and more stories in support of the industry are appearing.

Q No. 20. It says -- this is 1956. So we have

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gone another year, February 14th, '56. It says, A large proportion of the attacks against smoking made recently and expected to continue in the next few months originate with the same small group of critics who have led the anti-tobacco -- who have led the anti-tobacco moves of the past two or three years.

No. 2, Neither the press nor the public seems to be reacting with any noticeable fear or alarm to the recent attacks.

Again, is that a public relations issue?

A Yes, it is.

Q Next, let's move along a little faster. I think we can go to No. 22. And let's jump up to 1958. This is from Hill and Knowlton. The date is February 4th, 1958.

It says, Joe Cullman called me today asking that we jump in to take hold of the labeling legislation matters facing the industry in Massachusetts as well as in New York and in one of the Carolinas. And then going down to the middle of the page here, it says, The purpose of the meeting is to develop a plan for opposing the legislation, select people to appear at the hearings, and develop a line of opposition argument.

Now, did to your knowledge TIRC assisted by Hill and Knowlton develop arguments against labeling

legislation and get witnesses to appear?

A Yes.

Q Let's go to No. 23. This is a letter to Mr. John W. Hill, and it is authored by, last page, Paul Hahn, president, the American Tobacco Company. And have you seen this letter before?

A Yes, I have.

Q And is this letter the letter where Mr. Hahn gives basically the reasons -- I'm sorry. The date is February the 5th, 1958, where Mr. Hahn sets out the purposes behind the Tobacco Institute.

A Yes. In his opinion it should be to defend the industry against attacks.

Q And look at page 4. Let me see where -- wait a minute. Oh, I'm sorry. Page 3. I was a little ahead of myself. I'm sorry. Page 1. I forgot. All right. Page 1. In my opinion, the Institute's major area of activity and major objective should be to defend the tobacco industry against attacks from whatever source on tobacco as an alleged health hazard, including efforts to impose labeling requirements on tobacco products based directly or indirectly on the charge that tobacco is a hazard to health.

Did in your opinion the Tobacco Institute then take over, so to speak, much of the public relations

effort that had been conducted by the TIRC?

A Particularly targeting legislatures; that is, lobbying activities to influence what kind of laws and regulations were passed.

Q And on page 3, it says, The position of the

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SAB to date -- and what is the SAB again?
A Scientific Advisory Board.
Q Is that science does not yet know the answer to the question whether tobacco is a health hazard. Further research is needed. In recent weeks Dr. Little has countenance participated in a somewhat more affirmative approach. Basically, however, this remains the official SAB attitude. The position of the TIRC is more affirmative in the direction of disputing the validity of the charges made, but, nevertheless, limited and restrained by its association with the SAB which is a part of TIRC.
The position of the Tobacco Information Committee representing the interest in support of TIRC, but not speaking for TIRC as such, is an affirmative presentation of material which rebuts and discredits the charges. Now what charges do they mean?
A The cancer story.
Q This is exemplified in its publication, Tobacco and Health. Now, have you seen that

publication?
A Yes, I have.
Q All right. Let me see if -- let me hand you back the public statement book in evidence, and let me get the number of that.
MR. RILEY: Number 3.
MR. MEADOWS: That's No. 3.
Q And that is tab No. 14 marked in evidence, and that is something called Tobacco and Health. Is that exactly what they just talked about in the letter as affirmative presentation of material which rebuts and discredits the charges against cigarettes?
A Yes, it is.
Q All right. And you are familiar with these publications that came out over many years?
A Yes.
Q And did they go to physicians and medical schools and so forth throughout the country?
A Yes, they did.
Q Did these and similar publications have an effect on physicians and those in public health?
MR. RILEY: Your Honor, no foundation.
THE COURT: All right. I will sustain the objection.
Q Have you looked at whether or not physicians

and public health officials have been affected by the public relations techniques of the cigarette industry?
A Yes, I have. I have seen surveys of doctors' attitudes after this, that is in around 1960.
Q Would show?
A That three quarters of them didn't believe.
MR. RILEY: Your Honor, Your Honor, same objection. Calls for speculation.
THE COURT: I will overrule the objection.
MR. WILNER: Go ahead.

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THE COURT: He said he's seen documents.
A The surveys I saw indicated that the majority of those surveyed were still themselves smoking, and the vast majority were in doubt about the cancer studies; that is, they sort of accepted that there was a controversy, and it was still unclear, and more research was needed.
Q Let's go to No. 24. And this is 1959. And this says, Public Relations Proposals for the Tobacco Industry. So let's go to page 2. It says, Industry Positions Stronger Today. Now --
A Just a second. I am a bit --
Q I'm sorry. This is tab 24. I'm sorry. It's in the Hill and Knowlton.
A I'm sorry.

Q Back to Hill and Knowlton.
A Yes.
Q All right. Tab 24 says, Public Relations Proposal for the Tobacco Industry. Now this is up to 1959. Do you see that?
A Yes.
Q All right. And does it begin with kind of a discussion of what happened in 1954? I mean, does it reference 1954 and then go into what's happening in 1959?
A I don't see the reference to 54.
Q Let me help you. This is just context.
A Yeah.
Q Page 2, At the time of the formation of the Tobacco Industry Research Committee early in 1954, the tobacco industry was bombarded with widespread and sensational publicity that often left the impression with the public that cigarette smoking and indeed this alone was established as a cause of increasing lung cancer incidents. Do you see that?
A Yes, I do.
Q All right. Now, let's go down to the bottom of the page where it says, Industry Positions Stronger Today. In the ensuing years, research and public attention to it have gradually forced a recognition that

the cigarette theory of lung cancer causation is not established scientifically, and, in any case, would not provide the whole answer to the apparent recent increase of this cause of death.
Now what can you say about the public relations effort from 1954 to 1959, if that's what they are reporting in '59?
A That it was as effective as --
MR. RILEY: Your Honor, I object to this. Your Honor, I object. Can we proceed.
THE COURT: All right.
(Side-bar conference held outside the hearing of the jury)
MR. RILEY: Your Honor, here is my problem. This witness is unqualified to talk about why it is that

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there was a controversy or why -- and this document in particular talks about research. He is not here to talk about scientific research and what the medical research showed and didn't show at the time. He is not qualified to do that. He can't -- my concern is that he cannot -- he has testified to doctors were unsure. They thought among doctors that there was a controversy. Well, how does he know whether it's because of what the industry was saying or because there really was a controversy? He is not qualified to do this, and it's beyond his area

of expertise. He doesn't know whether there was a controversy or not.

THE COURT: He's just asking from a public relations standpoint. I think you can bring out -- you can ask him that question on cross-examination if he knows if --

MR. WILNER: Sure.

THE COURT: -- if there was a legitimate controversy or -- I mean, he wouldn't get the same results from a legitimate controversy, whether it made it seem like there is or whether there wasn't. But I think that's more directed -- he asked him specifically from a public relations standpoint. Can you discuss that. I thought you were going to ask -- require him to ask more speific questions instead of just discuss it from a public relations standpoint, but --

Are you saying -- all of his testimony is directed towards publicity. It doesn't mean that the publicity is wrong. He says in his opinion that it's aimed at getting out the side that best suits the cigarette manufacturers. I mean, you know, that's all he's said so far.

MR. RILEY: But my point is simply this. He is not qualified to say what effect that had on the medical community and what effect it didn't have. He

doesn't know. He is not a medical doctor. He is not trained.

THE COURT: You mean advertising standpoint? All right. Who is? Is a doctor qualified to testify as to -- wait a minute -- as to what effect it would have on the advertising?

MR. RILEY: No, I think a doctor would be better qualified to testify about the effect of this on medical science.

THE COURT: I have no problem if you bring a doctor in here to testify that this man doesn't know what he is talking about, that we don't pay any attention to the advertisements and never did. We don't care what the cigarette companies' advertisements say. I don't have a problem with that. I'm having a problem with why he can't testify to the significance of the advertising in his expert opinion. And I think that's just what he is asking then is from an advertising standpoint.

MR. WILNER: That's all. I think, Your

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Honor, this is proper cross. He may cross him on this as to the limits.
THE COURT: He can ask all of those questions.
MR. WILNER: I am not saying he can't bring

it out. That's what I'm saying. It's cross.
THE COURT: How much longer do you have with him?
MR. WILNER: I hope about 45 minutes we should be done.
THE COURT: Okay. Around three o'clock we'll take a break.
MR. WILNER: Absolutely.
(Side-bar conference concluded; proceedings resumed before the jury)
THE COURT: All right, Mr. Wilner.
MR. WILNER: Thank you. May it please the Court.
Q I was asking, was the public relations work as of 1959?
A Did it work?
Q Yeah.
A Yes, it did.
Q Okay -- No. 3 on page 3, Scientific and lay information concerning the findings mentioned above have reached many publics to create awareness of the doubts and uncertainties about the cigarette charges. Is that evidence that it was working?
A Yes, and by "many publics" they mean doctors, scientific editors, teachers, other identified groups.

Q And page 4, No. 7, I don't mean to be repetitive. Much countering attention to newspaper, radio and books has been encouraged and disseminated. Angles' piece in Harper's, Little In Atlantic Monthly, Ostraub's book, Why Stop Smoking, Northrop's, Science Looks At Smoking, Pageant article by Dr. Renoff, "Go Ahead and Smoke," and the Little interview with Modern Medicine and others. Are they also examples of what you mentioned before?
A Yes. That they were able to plant or disseminate their own publicity.
Q And look on page 5. And is there an actual awareness -- it says, Practicing doctors according to the most recent polls are not convinced evidence against smoking is conclusive. Is there evidence from this document that the -- that the public relations people are very concerned with how many doctors believe it?
A Yes.
Q And how many don't?
A Yes.
Q And No. 6, Nationwide -- Nationwide sensational publicity is declining with editors more clearly scrutinizing for news versus the same old stuff. What does that mean, "the same old stuff"?
A Well, that they were -- the editors weren't

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willing to keep publishing the cancer story from 1952. I mean, they wanted something hot off the press, as they say, something that was brand new.

Q And do they go on in this paper to give -- let me count -- at least 12 ways to fight any adverse publicity, beginning on page 8?

A That and then some. I mean, there's several lists of proposed activities.

Q Including, A New Scientific Perspective?

A Yes.

Q And were documents of that nature prepared by the Tobacco Institute over the years?

A Yes, there were.

Q Were they sent to doctors?

A Yes, they were.

Q Films for TV and lay audience. Were there films made that tried to debunk the health effects of smoking?

A I believe there were, but I haven't seen them myself.

Q Okay. Interpretive articles by Dr. Little and others, were those made for consumer magazines?

A Yes.

Q Tobacco and Health, is that the publication we just looked at?

A Yes, it is.

Q And they continued to publish that?

A Yes, they did.

Q Okay. And "A Doctor's Survey," No. 11 on page 11. The attitudes of physicians towards smoking and the lung cancer problem are important to know. A recheck of doctors' opinions regarding smoking can be obtained in a relatively short time through the Mediatrics Institute. And it talks about how they put together some kind of a poll of -- public opinion poll. Why as a public relations -- as a person with expertise in public relations, why were the attitudes of physicians towards smoking and the lung cancer problem important to know.

A Because they are important opinion leaders. That is, all -- most consumers are not prepared to digest the scientific information and make a knowledgeable decision on their own. They are going to rely on what the doctors' advice is. And if the doctor doesn't provide advice or conveys the opinion that there is a controversy and it's unclear, the consumer won't take any particular action, or unlikely to.

Q It says, Other Materials For Doctors. More scientific material could be sent to doctors. A major question is the availability of appropriate articles for

mass distribution. What does that mean?

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A They want more stuff to send to doctors, and they are having trouble finding it.
Q All right. And page 12. Local Schools and Communities. And it talks about the American Cancer Society's new anti-tobacco program. It says, Scope cannot be fully estimated. Official American Cancer Society pronouncements are even conflicting as to what is -- as to what is intended. This reflects the known controversy among ACS staff members as to the extent of anti-smoking efforts.
And then it talks about, No. 1, schools, and I will ask you about the schools and educators. Preliminary study and analysis of existing school anti-smoking programs have already been undertaken by Hill and Knowlton's educational department. The matters of dealing with health programs in schools should be considered only after careful study of the educational questions involved. What does that mean?
A Well, that they need to proceed with caution here on this front.
Q Provision of information about the history and economics of the industry to a large list of teachers is already underway through distribution of "Tobacco, A Vital U.S. Industry, and The Tobacco News."

Does that indicate that they were sending material to teachers?
A Yes, it does.
Q No. 27, Was the TIRC -- and this is up to -- this is '61. Was the TIRC involved in sending things to Congress?
A Yes, they were.
Q And does this show that -- what -- all the entire congressional list received regularly the following. One, All issues of Tobacco News. Two, all issues of Tobacco and Health. Three, The annual report of the scientific director of the Tobacco Industry Research Committee. And 4, other special publications and mailings, such as, 1, Tobacco, Source of Pleasure, Source of Wealth, B, Tobacco and the Health of the Nation -- or is it the wealth? Is it the -- it's The Health?
A Yeah.
Q And C, Tobacco and Americans, by Robert K. Hiemann. Who is Robert K. Hiemann?
A An employee of American Tobacco.
Q In addition, there is specific material frequently delivered to individual offices of congressmen and senators, including such items as state booklets to the various delegations concerned. Did the

Hill and Knowlton and TIRC people and later the Tobacco Institute maintain a close network of relationship with Congress?
A Yes, they did.
Q All right. And then let's turn to page -- to divider No. 28. And we are up to 1962. April 9th. The

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letter from Brady of TIRC to Little. And it says, Historically, on page 2 -- page 1, I'm sorry. It would seem that the 1954 emergency was handled effectively. What does that mean?

A That they had managed to put out the fire. That the health scare had been dealt with and was on the wane.

Q And then on the third paragraph it says, To date, the TIRC program has carried its fair share of the public relations load in providing materials to stamp out the brush fires as they arose. What are they talking about? What brush fires?

A Well, the periodic stories of a scientific nature that might get into the popular public press and cause a flurry of excitement. They wanted to respond to those in a timely way and keep it from spreading.

Q Do they express in 1962 that they will continue to do what they have been doing before with some success?

A Yes. I mean, this is a budget request for such a continuance.

MR. WILNER: I think for now that will conclude our review of the Hill papers and be a good time to take a few minutes because of that natural break.

THE COURT: All right. May counsel approach the side bar? We don't need the court reporter.

(Side bar, Court and counsel)

THE COURT: We will take the mid afternoon recess. If you are in the jury room at ten after three, we will be able to start right then. We will be in recess for twenty minutes.

(Jury exits courtroom; discussion off record and recess)

(Change of reporters, 2:50 p.m.)

THE COURT: All right, Mr. Wilner, whenever you're ready.

MR. WILNER: If it would please the Court. The Maddox family moves into evidence the

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group of documents which were marked yesterday as Defendant's Exhibit A for identification consisting of various press clippings on tobacco and disease matters.

THE COURT: Would that be 29, Mr. Langley?

MR. LANGLEY: Yes.

(Plaintiff's Exhibit No. 29 was marked for identification.)

THE COURT: Is that entered as Plaintiff's 29? Is that without objection, Mr. Riley?

MR. RILEY: Yes, Your Honor.

MR. WILNER: This is the original one that was marked, but since it has pen marks on it, I took the liberty of substituting a clean copy.

MR. LANGLEY: That's all right. This will be for ID.

(Plaintiff's Exhibit No. 29 was received into evidence.)

MR. WILNER: And at this time, the Maddox family also offers the volume entitled Popular

Press, consisting of more press clippings. We talked about that.

(Plaintiff's Exhibit No. 30 was marked for identification.)

THE COURT: That's without objection, Mr. Riley?

MR. RILEY: Yes, Your Honor.

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THE COURT: That will be No. 30, Composite Exhibit 30 without objection.

(Plaintiff's Exhibit No. 30 was received into evidence.)

MR. WILNER: Thank you.

Q Dr. Pollay, we've talked about the public relations campaign of the TIRC and Hill and Knowlton sponsored by the industry, and I'd like to ask you if you have had an opportunity over the course of your research in this matter to look at some of the actual press clippings that have appeared in various newspapers on the issues of science and disease.

A Yes, I have.

Q I am sorry -- cigarettes and disease. If I misspeak. I think it's the lateness of the hour and I apologize, I'm also getting kind of dry.

And let me ask you to turn to divider -- I apologize for the number, but that's the way they're

numbered -- 270 of the blue book, which is -- and you need it, right, because we only have one copy.

Okay. We'll get there. And this appeared in the Wall Street Journal, April 14th, 1954, and it's entitled Great Controversy, Tobacco Industry's White Paper and Smoking Cancer Tie In. Have you seen this article or articles substantially identical to it?

A Yes, I have.

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Q And is this -- wasn't the contact with the -- was the contact with the Wall Street Journal to give them information about this White Paper part of some of the documents we just got done reading?

A Yes. And the date of this is -- the release date for this document we saw earlier, The Scientific Perspective on the Cigarette Controversy.

Q Is this typical of the kind of press that the Hill and Knowlton people were successful in getting on the issue of cigarette smoking and disease?

A Yes, it is.

Q And what is the foreseeable effect on consumer interpretation on safety when such articles are carried in the Wall Street Journal?

A That there's still substantial in --

currently in their mind, there would be the perception of substantial uncertainty of the nature of the evidence and how conclusive it is.

Q Now, it was -- let me refer you to the Hill and Knowlton book just for a back reference and -- you don't have it. Do you have the Hill and Knowlton book? You gave it back to me. It's hard to keep track without a score card but -- there it is. All right.

So let's go. As a reference, Doctor, let's go back to Document 24, page four, item seven. And it was one of the last things we read.

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Much counseling attention through newspaper, radio and books, Leonard Engle's piece in Harper's and Little's in Atlantic Monthly. Do you remember reading that. And look at the press number -- I lost it. Sorry. Yes, 99. "The Public and Smoking: Fear or Calm Deliberations." And on page three, it shows that this is in the Atlantic Monthly and that it's written by C. C. Little; do you see that?

A Yes.

Q And have you seen this paper or one substantially like it written by C. C. Little in the Atlantic Monthly?

A Yes, I have.

Q And does this give the expected object -- the TIRC argument of the day?

A Yes. And describes the critics as engaging in propaganda.

Q And the critics are who now?

A The cancer people like Ochsner and Wynder and some Heimann.

Q Does this illustrate a public relations principle as well?

A Yes.

Q What is that?

A To belittle the opponent at the same time you're presenting yourself as reasonable.

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Q Was the Atlantic Monthly a well-respected magazine at the time?

A Yes.

Q And when you look through the Hill papers, were you able to find that the papers connected to the press that actually was sent out to the world?

A Yes. I mean, as a result, I believe the Hill annual reports, progress reports to be accurate descriptions of what was actually going on.

Q And have you actually found the newspaper clippings that resulted from many of these efforts

by Hill and Knowlton?

A I haven't pursued all of them, but I have seen many. You'll see the clipping and the discussion of it in the annual progress reports.

Q And please look through the smaller bundle here, which was previously marked as Defendant's Exhibit A and now has been marked at Plaintiff's Exhibit --

A 29.

MS. STEIGER: 29.

MR. LANGLEY: 29.

Q Thank you, everyone. And tell me if in these -- let's look at number two. Page two. Warnings Against cigarette panic appearing in something called Journal America February 28, 1954. Was this the middle of the TIRC public relations -- the first major effort of TIRC to do its public

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relations thing?

A Yes, it is after the beginning of TIRC's activities.

Q And is this a typical article that is either identical to or substantially similar to the ones that you have found reported directly from TIRC's activities?

A It's certainly similar in tone, that waits

don't account perceptually, the wait for more research, more evidence. I'm not certain, however, that this is specifically the result of TIRC initiatives, this particular story on this particular date.

Q Absolutely. Now let's go to "Cancer from Tobacco: It's a Question of Mice." And that's from the New York World Telegram, December 17, 1953. Again, is this a typical type of article that appeared in the press as a result of much of the activity that was going on?

MR. RILEY: Objection, Your Honor. Your Honor, I object.

MR. WILNER: We'll withdraw it for time, no problem.

Q Please look through the -- let me do one of them. I'm sorry, let's do the "Cause of Lung Cancer Unknown, Doctors Say" from the Grand Rapids Herald, Grand Rapids, Michigan, in the Escanaba

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Press. Isn't this about the same date of some others ones I've seen right about this time?

A Yes, it is.

Q And how do these remote newspapers in Escanaba -- Michigan or Wisconsin?

A Michigan.

Q -- get this kind of information?

A From the wire services, the syndication of news coming out of New York, most of the time.

Q And so would it have had a basis -- even if we can't trace this particular article, would it have most likely, in your opinion, been a base in the public relations activity that was conducted?

MR. RILEY: Your Honor, I object, that calls for speculation.

MR. WILNER: It's his field, Your Honor.

THE COURT: I'll allow it, Mr. Riley.

A Yes, I believe it would either, in whole or in part, have been influenced by the public relations.

Q Would you look through all of the -- well, you don't have to read each one, but look through the articles that appear in this Popular Press book and tell us whether or not those are typical of -- first, are they typical of articles that appeared in the press for the period?

A Yes, they are. They seem to be a cross-section of things, some more critical and some

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more exonerating. They vary in tone.

Q And looking at them as a whole, what would the foreseeable consumer feel upon reading all this

material as to the safety or health of the product?

A That it was still a matter of some speculation that there was an ongoing controversy, and there was still ongoing research necessary before consumers needed to take any action.

Q To be sure, were there publications that said that cigarettes were dangerous?

A Yes, they were.

Q And were there publications that said cigarettes caused cancer?

A Yes, there were.

Q And were there publications that questioned that view?

A Yes.

Q Now, have you, as part of your research, had an opportunity to see the report of the Federal Trade Commission that was issued to Congress in 1965?

A Yes.

Q And is that part of the research materials that you would usually -- or that you have typically relied upon in your professional life?

A Yes, that and -- in fact, all of their reports with respect to cigarettes.

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25 Q Why was the -- earlier in the day, you

1 mentioned that the Federal Trade Commission had
2 convicted American Tobacco for false advertising in
3 1951, remember?
4 A Yes.
5 MR. RILEY: Your Honor, I object to the
6 form of the question.
7 THE COURT: All right. I'll sustain the
8 objection to the form of the question.
9 Q What did you say earlier about the Federal
10 Trade Commission and American Tobacco, so we can
11 lead into Federal Trade Commission?
12 A I can't remember verbatim, but my
13 recollection, I shared the fact that they had been
14 charged in 1942, and in 1951 formally, a cease and
15 desist order that was issued forbidding them from a
16 variety of practices in their advertising the
17 Federal Trade Commission found objectionable.
18 Q And has the Federal Trade Commission been
19 concerned for years over the effects of cigarette
20 advertising on the consumers' expectations?
21 A Yes, they have.
22 Q And in 1969, what was going on in the
23 country that caused the Federal Trade Commission to
24 write this report to Congress?
25 A Congress was considering labeling and

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other forms of public policy to do something about the cigarette advertising promotions and marketing in general.

Q And did they have hearings in Washington where different members, both of industry and governmental groups and other, came up and testified?

A They did.

Q And did the Federal Trade Commission submit a report to Congress on issues that were pending before Congress at the time?

A That they did.

Q And was that report the -- let me see if I can get it straight -- known as a statement -- wait, I want to get it right. Was that report -- well, let me see. If you have it in front of you it will be easier than me reading it.

Let -- what I'm referring to is the report of the FTC which is reported in the hearings on the Committee of Commerce, United States Senate, 89th Congress, first session -- a bill to regulate labeling of cigarettes and for other purposes, March 22nd, 23rd, 24th, 25th, 26th and 30th and April 1st and 2nd, 1965?

A Yes, I have that cover page, and then the

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testimony of Paul Randixon who was the chair of the Federal Trade Commission.

Q And are you -- you are familiar in -- with this report and have referred to it earlier, and do you find it to be a scholarly analysis of the situation?

A Yes, it's a detailed view of the situation written by the staff of the Federal Trade Commission.

Q All right. Well, I'm going to ask you, then, about certain matters on here, whether you agree or disagree and how they affect your opinions in this case.

Could we see, first, the cover page. So this says, The hearings on the Committee of Commerce, United States Senate, 89th Congress. And this is 1965. Now, just for historical purposes, were there labels on cigarette products in 1965?

A No, there were not. The manufacturers had labels; there were no warnings.

Q When you say labels, what do you mean by --

A The brand identification and, maybe, trademark claims and other things like that.

Q Okay. And did the cigarette industry

oppose the imposition of labels?

A Yes, they did.

Q And did the --

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THE COURT: Warnings, Mr. Wilner? You keep saying "labels."

MR. WILNER: Warning labels.

THE COURT: All right. Okay.

MR. WILNER: Cautions, yeah.

Q And did the Federal Trade Commission in this report take the position that warning labels should be required?

A Yes, definitely.

Q Now, are you aware of whether the industry took the position that all people in 1965 or that -- not all people, but that consumers as of 1965 knew about the dangers?

A That was their position, yes, that a warning label would be unnecessary because people already knew of the risks.

MR. RILEY: Your Honor, could we be seen?

(Side-bar conference held outside the hearing of the jury)

MR. RILEY: My objection, Your Honor, is this goes back to the issue we raised before. I don't think that what the companies have to say to

Congress can be -- it's inadmissible in evidence; it's protected by the First Amendment; it cannot be used as a basis of the lawsuit.

MR. WILNER: I don't understand the objection.

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THE COURT: I don't either.

MR. RILEY: Judge, it's irrelevant.

MR. WILNER: What is?

THE COURT: What is?

MR. RILEY: I know where Mr. Wilner's going.

THE COURT: I don't.

MR. RILEY: I think the question is going to be what the industry said to Congress about the warning labels and whether warning labels were necessary, whether they weren't necessary and why, and I think that's improper.

MR. WILNER: First of all, yes, eventually we will get to that. But I'm first getting to the FTC. But what the industry says in Congress is a statement made to the public. That's absolutely something that we will talk about, especially if it contradicts another position that they took. You're not allowed to get up in Congress -- if you get up in Congress and say something different from what

you said some other time, that is absolutely fair game.

THE COURT: I'm having trouble understanding the thrust of your argument, anyway, Mr. Riley. Certainly the cigarette companies come under the First Amendment. They can say whatever they want, within reason, you know. And what they say is protected by the First Amendment.

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But the First Amendment is not a protection against having what you say repeated. So I mean, I don't understand why you think it's free speech. Certainly they can say whatever they want, but I know nothing in the First Amendment that keeps that from being repeated by someone else or from someone giving testimony as to what was actually said, especially if it's public record testimony.

So I guess what I'm having trouble with is you're saying -- I don't know of any First Amendment protection that keeps -- that requires me or any other judge to keep someone else from saying what was said under the First Amendment. Now the first -- obviously it goes to can I keep you from saying that. No, I can't. But, I mean, what is the First Amendment protection that you're talking about, free speech? If someone's going to say

something about it later, then it's not free speech?

MR. RILEY: Judge, we submitted a motion in limine on this point, and I don't know if you're familiar with it or not, whether you've had a chance to look at it or not. But I think the arguments are right there and I think --

THE COURT: Is that one that Judge Weatherby ruled on because --

MR. WILNER: It was denied.

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MR. RILEY: I'm not sure whether he did it or not.

THE COURT: I focused on the ones that were reserved for me.

MR. WILNER: He only granted one, and that was about the foreign label.

THE COURT: If you'll explain to me why that's a free speech --

MR. RILEY: Judge, the testimony cannot be admitted against defendant. The positions that the companies took in Congress cannot be used against companies because that would have the effect of chilling their right to petition government and the right of free speech before Congress

THE COURT: Let me ask you this: You've

got some cases that say that free -- that a First Amendment even protects you from speech which is used in the furtherance of a conspiracy.

MR. RILEY: Judge --

THE COURT: What I'm talking about is, there is a conspiracy here, Mr. Riley and I don't know of any protection that --

MR. RILEY: Judge, I don't think Mr. Wilner is entitled to look behind what Congress did. He can't come in here and persuade the jury --

THE COURT: I don't think he can either. I think he can present evidence of what the tobacco companies told Congress.

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MR. RILEY: But if he can -- where is the sense in coming into court? It's not coming into challenge and look behind what Congress did.

THE COURT: Excuse me, but isn't part of this case what they knew and when they knew it? And statements to Congress in 1965, would that not indicate what they knew or didn't know?

I mean, that's what I'm talking about. They were free to give those statements, and that's a First Amendment right. But I don't know that they could reasonably expect that under the First Amendment, those statements couldn't be repeated or

assigned to them. I mean -- now, I agree with you, what Congress chose to do with that is up to Congress, and I think that's part of the reason that he's already said -- and we all know that beyond 1969, they have no case for failure to warn, because Congress has pretty much said that the warning label -- if you put this warning label on there, that's warning enough.

MR. WILNER: Right.

THE COURT: So I don't understand --

MR. WILNER: We can't pretry the whole case, what might happen, but --

THE COURT: First place, I don't know what he's going to say. Mr. Riley and, apparently, you know what he's going to say. But I don't know what

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he's going to say.

MR. WILNER: It's not what Mr. Riley's worried about. But I think Your Honor's exactly right. All we're talking about now are what statements were given to Congress.

THE COURT: And obviously, it's cumulative -- in any kind of conspiracy prosecution if you will -- and that's what Mr. Wilner's doing is prosecuting a conspiracy count -- then, you know, we're talking about conduct and, usually, cumulative

conduct, which we are in this case.

And if in 1965 -- and I don't know this to be a fact -- that they testified before Congress that there was no problem, and I don't know why that can't be repeated.

MR. RILEY: Judge, you can conspire to influence Congress under our Constitution. And you can't be held accountable for that. That's the no-panic to try doctrine that we have cited to you and it's been cited in the briefs we filed. It's First Amendment case law. And you can conspire to lobby and influence government, and it can't be part of the claim against you.

THE COURT: So the --

MR. RILEY: It's an antitrust situation.

THE COURT: You're saying it's a First Amendment protection. You can lie under oath to -- I'm not saying they did -- but you can lie under

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oath in a public forum and have that disseminated, but you are protected from anyone saying that what you said was this and that that's not correct.

MR. RILEY: You can't be sued because somebody thinks Congress didn't pass a law that was strong enough or good enough.

THE COURT: I absolutely agree with you.

MR. WILNER: I agree, too, but they do it every day.

THE COURT: But that's not what we're talking about. We're talking about what they said to Congress, not what Congress did with it. And they're not suing because Congress didn't do enough.

MR. RILEY: I'm not sure why -- I think that is part of this case. I don't know whether Mr. Wilner's going to make that claim or not.

THE COURT: If he was going to make the claim that Congress should have in 1969, instead of putting warning labels, stop the cigarette companies from manufacturing cigarettes, then I would agree with you. But that's not, I don't think, where he's going.

MR. WILNER: No. And I agree we can sit here and speculate about a lot of things. But really all we're doing is asking for a few -- the statements made to Congress. I agree, we can sit here and say what it --

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THE COURT: I don't know why they wouldn't be admissible. Okay.

(Side-bar conference concluded; proceedings resumed before the jury)

THE COURT: Ladies and gentlemen, I see a

few of you trying to fan yourselves. We've tried to get them to put on as much of the air-conditioning as we can. And they apparently have it up full blast now. I don't know whether -- they started out with the heat this morning and they decided we needed air-conditioning, but we have tried. So just bear with us, if you will.

(Change of reporters, 3:40 p.m.)

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MR. WILNER: All right. One second, Your Honor. I'm trying to get a document. I'll be done in just a minute. We're just missing -- believe it or not, Your Honor, with all of these piles of stuff always the one you want is somewhere else; isn't that the truth, so we've -- but we're okay.

May it please the Court?

THE COURT: All right.

MR. WILNER: Okay.

THE COURT: We still have the court reporter.

MR. WILNER: Okay.

BY MR. WILNER:

Q Dr. Pollay, the last thing I asked you was did the cigarette industry testify for Congress, in fact in the person of one Bowman Gray, representing all of the industry, that they were opposed to putting cigarette labels on in 1965?

A Yes.

Q And did they use as one of their arguments the argument that, well, everybody already knew so it didn't -- so why bother to put a warning on it, or words to that effect?

A Yes.

Q And that actual testimony is in the -- is

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quoted verbatim in the official transcript of the hearings; is it not?

A Yes.

Q And unfortunately we just didn't have this in the courtroom and perhaps -- hoping you won't be having to stay too long, but as we get it, we'll provide it to you to confirm that that's what happened.

But getting back to the FTC. Did the FTC also come into this proceeding to give evidence on the question of whether in 1965 a warning label was needed because people didn't fully understand the risks?

A Yes, they did.

Q And is this section that I have -- that you have found for us a transcript of their arguments on that point?

A Yes, it is. And I think the rather full and complete detail of their arguments, that is, many pages of excerpts here.

Q All right. Was one of the reasons that they used that -- to bolster their argument that people were not well enough informed was the effect of cigarette advertising on people -- people's expectations?

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A Yes.
Q All right. Would you look at page 492. And this is -- confirm for us what this means when it says "cigarette labeling and advertising"?
MR. RILEY: Your Honor, hearsay; objection.
MR. WILNER: Hearsay? It's a government report, Your Honor.
THE COURT: I'll overrule the objection on that basis.
BY MR. WILNER:
Q Would you confirm for us what cigarette labeling and advertising -- what that means on the heading?
A The heading is a reference to the title of the hearings. It's the same heading that appears on the title page that you had up a short while ago.
Q All right. So this is part of that same document?
A It is.
Q All right. "In the cigarette industry advertising has actively stimulated demand for the advertised brand by portraying cigarette smoking in general, and the smoking of the advertised brand in particular, as a satisfying, desirable and

attractive activity."

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Is that what you testified to earlier?

A Yes.

Q And underneath: "Such advertising has associated cigarette smoking with such positive attributes as contentment, glamour, romance, youth, happiness, recreation, relaxation, comfort, and sophistication, at the same time suggesting that smoking is an activity at least consistent with physical health and well being. Furthermore" -- do you agree with that?

A I agree that that's a good characterization of the advertising, particularly in the last decade preceding this, that is, from 1955 to 1965. Had they written it a decade earlier, they would have made more about the explicit health claims of the advertising.

Q All right. Page 493. It says -- I want to get to the meat of it. In short, "Although advertising claims respecting the satisfactions of smoking or respecting health or safety features of a particular brand are not necessarily untruthful in themselves, standing alone they are at best half truths. They may be literally true, yet they are still likely to convey the false impression that

cigarette smoking is not dangerous to human life and health. The disclosure of the hazards of smoking is necessary to correct a deceptive half truth."

Now, what does that mean as an expert in

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the field?

A That the nature of the advertising by its use of pictures of health and implications of healthfulness. The way filters were being sold, for example, was creating an impression that needed to be counterbalanced by an explicit warning.

Q And down here: "Cigarette advertising of the kind described above, i.e., advertising that lays heavy stress on the satisfactions of smoking and frequently attempts to negate the dangers of smoking but never discloses those dangers, has for many years dominated and continues to dominate the industry. Its volume has been very great."

What is that in reference to?

A The kind of evidence I talked about this morning about the average person seeing 2,000 cigarette ads a year on television, for example.

Q "Advertising so intensive and long continued throughout an entire industry is bound to create and has created a powerful impression, in this case one of smoking as a satisfying,

pleasurable, and perhaps even indispensable, activity which is consistent, at least, with physical health and well being. That impression is now firmly lodged in the minds of the consuming public."

Now, this is when? This is 1965?

A This is 1965.

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Q Do you agree that the impression was firmly lodged in the minds of the consuming public?

A Yes.

Q Does that mean that nobody had any suspicion that smoking was bad for them?

A No, it doesn't mean that. It just means that those were suspicions; they weren't hard, fast conclusions.

Q Let's go to page 494, at the bottom of the page. "Cigarette advertising, concentrated in the media having the widest consumer exposure, has increased rapidly and continuously in the decade since concern with the hazards of smoking first reached significant proportions.

Considered as a whole such advertising has emphatically, and persistently driven home in the minds of its vast audience the pleasure and desirability of cigarette smoking.

Further, it has frequently implied that smoking or smoking the advertised brand is harmless or relatively harmless to the health of the individual."

Is this consistent with your previous opinions?

A Yes. And it calls attention to the fact that one of the ways they countered the health scare was to increase the amount of money they spent on

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the advertising in addition to creating this public relations effort as they did.

Q "The net effect of this advertising, it's magnitude and content, has been to help maintain cigarette consumption at a high and rising level, despite the increasingly patent dangers of the habit, while thus spending hundred of millions of dollars to iterate and reiterate that smoking is attractive and satisfying and to allay anxiety on the score of the hazards of smoking. The cigarette manufacturers have made no effort whatever and have spent nothing to inform the consuming public of the mounting and now overwhelming evidence that cigarette smoking is habit forming, hazardous to health, and, once begun, most difficult to stop."

That was a long sentence, Doctor. Can

you -- is that consistent with your previous opinion?

A Yes. It points to the fact that all of this advertising failed to disclose the addictive nature of the product and the deadly nature of the product.

Q "On the contrary, the cigarette manufacturers and the Tobacco Institute have never acknowledged and have repeatedly and forcefully denied that smoking has been shown to be a substantial health hazard. The cigarette industry's massive, continuous, mounting, and forceful

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advertising, coupled with the refusal to acknowledge or take any steps to inform the consuming public of the hazards to health, has blunted public awareness and appreciation of these hazards and has tended to maintain demand for the product in the face of growing public concern."

Now, let me take that part. Do you agree that the advertising and the refusal to acknowledge or take any steps to inform the public of the hazards to health has blunted public awareness of the hazards?

A Yes.

Q Why does that happen?

A Because of the many things we -- of the many sources we have about the products we consume when we go to the market, advertising is a principal one. And if nothing in the advertising calls our attention to any issues of health, it gets driven out of our minds, the news stories we encounter rarely and sporadically and the advertising we encounter every day, and it just gets overwhelmed. That is, any news that there might be gets overwhelmed by the advertising.

Q How many -- just as an expert in communications, if I have a newspaper, which I don't have with me, but let's -- oh, thanks.

Let's assume this was a newspaper,

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although it isn't, but let's assume it was a Times -- we have the Times Union here and you have an excellent paper in Vancouver, if I -- is there -- do professionals have a way of estimating how much you retain out of a newspaper? You know, you look at a newspaper you look at the stuff in it.

A Well, I can't give you how much -- an answer to the "how much" question in terms of percent, but it's certainly known that people pick up most from the headlines, and very few people will read much of the fine print. And even when they do,

what they recall is typically a bite, like a sound bite, that is something that's encapsulated in the headline, a summary point of view or conclusion, without recalling much of the detail.

Q How much do you retain after five years?

A Very little. That is, you couldn't recall the specific facts or where you saw this or where you learned this.

Q Okay. Let me go on. "Not only has the industry failed to disclose to the consuming public the dangers of cigarette smoking, it's past and present advertising has camouflaged them. The cumulative effect of at least a decade of massive cigarette advertising has been to establish a barrier to adequate public knowledge and appreciation of the health hazards."

Now, when you formed your opinion -- is it

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consistent with your opinion?

A Yes, it is.

Q So is your opinion that the -- that advertising, even if it doesn't mention health, can form a barrier to information about health hazards?

A Yes, and it's -- it makes it almost impossible for the public health community to counteract it because they don't have anywhere near

the budgets that the tobacco industry was spending. I mean, they don't have the 200 million dollars a year these days to spend, or the 5 billion dollars a year in today's terms.

Q Let's turn to page 500, the very bottom of the page. "First, we know that in our societies -- in our society a favorable climate of opinion exists which supports smoking behavior." Was that true in 1965?

A Yes.

Q Were a lot of people smoking then?

A Yes, the majority of adults.

Q "The mass media can be quite effective in reinforcing this general climate since they conspicuously avoid presenting content which is inconsistent with or in opposition to this general climate.

This is primarily true of cigarette advertising since it does not present a balanced

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appeal to the individual with respect to both the favorable and the detrimental effects involved in smoking."

Do you agree?

A Yes.

Q "In addition, the advertising appeals

which seek to promote and reinforce smoking behavior are anchored in an awareness of the fact that individuals tend to see and hear and remember those things which fit within their basic needs and values, and that they are likely to selectively respond or pay attention to material which directly or implicitly relates to these needs."

And that was a little hard to understand. Would you explain what they meant?

A That we draw from advertising things that meet our needs. So if we're concerned with their social status, we look to the advertising for clues as to what kind of products we might buy in order to enhance how we appear to our neighbors, for example. So it depends on your needs what kinds of ads you respond to.

Q All right. And on page 2 -- I'm just going to skip some for -- I'm sorry, numeral two on this page, skipping something for time.

"While no single kind of commercial, such as one promoting the sale of one brand of cigarette over another, can be expected to have much

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influence. The cumulative effect of a constant bombardment by many kinds of cigarette commercials and advertisements is a different matter. Together

with smoking heroes and heroines in many TV shows and certain other presentations of a similar nature, it would tend to create a general image of smoking as a typical, if not desirable, cultural trait in our society.

"This would reinforce the social influences towards smoking that may exist" -- lousy copy -- "that may exist, among adolescent groups, as well as weaken any rational counter arguments."

Is that what you were telling us earlier?

A Yes, that advertising has the effect of influencing what's sometimes called peer pressure, that is, I'll smoke because I think I'll look cool in the eyes of other teenagers. So that's a logic that teenagers fall victim to, in part because the image of cruelness has been established in the advertising.

Q And when it says, "weaken any rational counter arguments," what does that mean?

A Well, things like exhortations from parents or teachers that you shouldn't smoke.

Q Now, it says -- let's go to No. 3, next page: "The mere fact that millions of dollars are spent yearly on advertisements for cigarettes

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reflects a conviction on the part of cigarette

manufacturers that such advertisements are effective."

Do you agree?

A I do.

Q Page 503. Now, before we go to 503, was part of -- did the FTC, in this report to Congress, analyze what information the public had not only from advertising if -- or whatever that means -- but from sources like the Surgeon General's report?

A Yes, they did.

Q All right. So let me ask you in that connection, Page 503. It begins -- on No. 1: The publicity -- arguments against the positions posed action. That's No. C.

Now, do you understand that to be the cigarette company's arguments against the labeling?

A Cigarette companies and others joining with them to fight the labeling.

Q Okay. "Various arguments were made in the course of these proceedings against the Commission's adopting the proposed trade regulation rules. All of these arguments have been given the most careful consideration by the Commission." We shall attempt to -- "we shall attempt in this section of the report to deal with them fully."

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And then it says, No. 1 -- and this is -- it's stating an argument, right?

A Uh-huh (affirmative).

Q All right. "The publicity that has been accorded the medical findings on the health hazard of smoking."

Now, I want to represent to you that counsel for Brown & Williamson in opening said that there had been a great deal of publicity of the findings of Wynder and Graham, and things, and that that -- therefore, there was widespread public knowledge. And let me direct -- with that reputation let me direct the question. This says --

MR. RILEY: Your Honor, I object to the preamble. If he wants to ask a direct question, I have no problem with that.

MR. WILNER: Well, I'll trying to lead into my question.

THE COURT: All right. Try not to lead the witness.

MR. WILNER: Yes, Your Honor.

BY MR. WILNER:

Q "It is argued that wide publicity has been given the report of the Surgeon General's Advisory Committee and other reports or findings on the

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health hazards of smoking by the news media or through the educational efforts of public and private groups that consequently the consuming public is aware of the hazards of smoking and that, therefore, the failure to disclose these hazards in cigarette advertising and labeling is not deceptive. No one is fooled because everyone knows that smoking is dangerous."

Do you see that?

A Right.

Q Is that a position that the cigarette industry, to your knowledge, took in these proceedings?

A Yes, and that's what they're going to discuss in the subsequent paragraphs.

Q And is that a position that the FTC agreed with or disagreed with?

A It disagreed with.

Q All right. Next paragraph. "We know of no way of accurately measuring the intensity and effect of the publicity that has been given reports of the hazards of cigarette smoking. We can only surmise.

"Among the many millions of Americans who smoke cigarettes or who are considering whether to

begin smoking or resume smoking, there are undoubtedly some, probably a very small proportion, who have read and digested the findings of the

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report of the Surgeon General's Advisory Committee."

Let me just stop there, although there's no period.

Do you agree that the Surgeon General's report was not sent to the public?

MR. RILEY: Your Honor, can we be heard?

THE COURT: Okay.

(Side-bar conference held outside the hearing of the jury)

MR. RILEY: Judge, I think it's improper for him to read extensive passages from a document and then to ask him whether he agrees or disagrees with it. I think is it improper bolstering of the testimony. I don't think it's appropriate, and it's rehashing what we have covered already. And I don't think he can bolster the witnesses' testimony this way.

MR. WILNER: Well, as to rehashing, I mean, this is an important government source, and I think that's very different from the witnesses just testifying. And I think he's also an expert in this

area and can clarify and explain how this relates to what he's been testifying to.

THE COURT: Well, your objection is what?

MR. RILEY: Judge, well aside from that, I mean, I have a problem with showing a witness a

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document and then saying, do you agree with this. I don't think that that's a proper way to proceed on direct examination. It's an improper attempt to bolster the witnesses' credibility.

MR. WILNER: I think it's proper. I mean, he's expressed that this is a document he's well familiar with. It's produced by a government agency. I think he's entitled to comment on it. I mean, what's the objection that he says -- is it consistent with what you said? Okay. Well, I won't ask him that. I'll ask him, will you comment on this or put this in the perspective that we -- and it's customary to do things --

THE COURT: Well, to ask his knowledge of the cigarette companies' position was in 1965 --

MR. RILEY: He doesn't need the report to do any of this, Your Honor, and that's my objection.

THE COURT: Well, I mean, I don't think it's my job to tell him what he needs or doesn't need to prove his case, I mean, if it's proper to

use the report, and I don't know -- I have already ruled that there's not a first amendment protection to the report. This is a public document disseminated to the public, is it not?

MR. RILEY: Yes, it is.

MR. WILNER: Yes, it is, absolutely. It's within his field of expertise as well. That's why I think he should consider it. But we're almost done

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with it anyway. I've got another ten minutes or so and it will be gone.

THE COURT: Well, to the form of the question, if you want to ask him if he knows whether or not that was the cigarette company's position at that time, that's different than do you agree with it or not.

MR. WILNER: Okay.

THE COURT: But, I mean -- but I will -- so I'll sustain the objection to -- as to that extent.

BY MR. WILNER:

Q All right. We were in the middle of the sentence. This was a long sentence. I apologize. Thank you. Thank you, Stephanie.

And this -- this began -- I hate to read the whole thing again, but it says, "There are

undoubtedly some, probably a very small proportion, who have read and digested the findings of the report of the Surgeon General's Advisory Committee."

My question to you was, as an expert in the field was the Surgeon General's -- was -- were the reports of the Surgeon General sent to the public?

A No, they were not.

Q "Who have read or digested the Surgeon

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General's Advisory Committee and who realized further that these findings represent the consensus of medical thinking on the subject.

"There is probably a much larger proportion consisting of people who have read or heard about the report and have a general awareness of its findings."

And is that -- do you agree or disagree that -- with the statement that there is a larger percentage who have a general -- let me get it right -- who have read or heard about the report and have a general awareness of its findings?

A Certainly much larger than those people who would have read the report and seen it firsthand.

Q "Almost certainly there are many, very possibly millions more, whose only awareness at best is that there is a controversy over the health consequences of cigarette smoking."

Now, in light of that statement, did you tell us earlier that it was one of the public relations objectives to form in the public's mind that there was a controversy?

A Yes, it was.

Q And are you aware that the Federal Trade Commission, as expressed in this report, looked at whether the -- whether the minds -- the collective minds of the consumers thought that there was, in

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fact, a controversy over the health consequences?

A Yes. They realized the controversy had -- a position had been accepted by a large number of consumers.

Q All right. Now, I'm going to ask you about the next sentence in some detail.

"But there is a difference between knowledge of the hazards of smoking and mere awareness that such hazards have been alleged or conjectured."

Now, what does that mean?

A Well, the fact that you hear that there

might be hazards is different from knowing for certain that there are hazards or knowing the magnitude of those hazards. It's like the difference between a rumor and a fact.

Q Well, why does it matter, in terms of what consumers are likely to do, whether they have just heard about it or whether they believe it?

A Well, they have to believe it before they're likely to take much action on it, particularly in this case where you've got an addictive product. And in the absence of any government action, people still treat it as just rumor, that is, they feel like it's not a very serious problem, because if it was a serious problem the government would take some action. So the FTC's

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position here is that we, we as the government, have to take some action.

Q And it goes on to say, and perhaps the member -- let me get this straight.

"And clearly the members of our last consumer group, and perhaps the members of the second group as well, do not know the fact established by the Advisory Committee's report and by other authoritative studies, that cigarette smoking is a cause of lung cancer and other serious

diseases and contributes substantially to excess mortality."

What does that mean?

A That the public just don't appreciate the seriousness of the problem.

Q "Since a substantial segment of the consuming public" in all probability -- "is in all probability not aware of this fact, a fact plainly material to their deciding whether or not to consume cigarettes, the sellers failure to disclose it" is a deceptive -- "is deceptive, notwithstanding the publicity that has been given to the question of smoking and health."

And explain that just briefly.

A That the industry should be disclosing the health problems in their ads, and their failure to do so creates a false and misleading impression that smoking is okay.

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Q 504 at the "furthermore."

"Furthermore, the argument that everyone is aware of the health hazards of smoking fails to take adequate account of the existence of different levels of awareness."

As a professional in the field, what does that mean, different levels of awareness as it

relates to consumer expectation?

A Well, like a very superficial level would be a suspicion that there are some hazards. More detailed deeper knowledge would know what those hazards were. And even deeper knowledge would know the extent of those hazards; that if I'm a smoker, am I twice as likely to get lung cancer, ten times as likely to get lung cancer, something like that. So it's having a better handle on the extent of these health risks, as opposed to just having kind of a vague idea that I guess there's something that's not right about smoking.

Q So it goes on to say, "To be remotely or dimly aware of a subject is not the equivalent of having the kind of knowledge upon which people normally act."

Now, in terms of -- in your expertise, what does it take to get action on something like smoking and disease?

A Well, some official governmental

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declaration or some admission on the part of the manufacturer would also, I think, have impact.

(Change of reporter, 4:10 p.m.)

Q To be remotely or -- Much of the publicity concerning the health implications of cigarette smoking is mere hearsay. Many people are aware that it has been said that smoking is harmful, but this is not the same as knowing that smoking is harmful. Relatively few have studied the sources of the publicity themselves; for example, the Advisory Committee's report. And when they use Advisory Committee, what do they mean?

A Well, I think they're referring to the Surgeon General Report.

Q As far as many and perhaps most people are concerned, the hazards of smoking are in the class of rumor, albeit disquieting rumor, rather than fact.

Now as of 1965, can you say as an expert that the hazards of smoking, not to everybody, but the hazards as far as many and perhaps most people were concerned, it was more of a rumor than a fact, sir?

A Yes. It was still treated by many people as a matter of controversy.

Q This is an impression that has probably

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been reinforced by the cigarette industry's refusal to admit that smoking is, in fact, dangerous, and by

the failure of government to take as yet affirmative steps to protect the public from the hazards.

Let's go to the industry. It says, This is an impression that has probably been reinforced by the cigarette industry's refusal to admit that smoking is, in fact, dangerous. Why should that matter, as an expert? Why does it matter what the industry says?

A Well, because if the industry did admit it, the public would take that quite seriously, and the failure to admit it suggests to the public that, I guess, it's okay.

Q Well, why would the public -- just to follow up your statement. You said if the industry would admit it, the public would take it seriously. Why?

A Because it's against the economic interests of the industry to do so.

Q Are there many people -- and again, as an expert just painting with a broad brush, who don't -- who, at least as of 1965, who didn't necessarily believe what the government said?

A Yes.

Q Is that still true?

A I think that is still true, yes.

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Q 505: Such awareness is an especially inadequate substitute for actual knowledge in the case of a product such as cigarettes, the consumption of which is a habit difficult to break. As the Surgeon General's Advisory Committee observed, the smoking habit is linked with so many aspects of a person's psychological makeup that mere intellectual awareness of the risks involved, even among those with rather intimate and intensive contact with the subject, is insufficient to overcome other dynamic factors involved.

And it cites ACR, which is, I think, the Surgeon General at 375. For a person habituated to smoking, it may provide a convenient means of evading the question of whether to discontinue smoking because of the health hazards involved to view the whole problem as an unsettled, quote, 'controversy,' a health scare, the objective significance of which has not been established, but only discussed.

Would you explain that to us.

A Yes. As someone who is addicted to smoking is comfortable with the belief that there is a controversy; that there is insufficient evidence. And I think one of the -- the brilliance of that PR

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strategy is that once you establish this controversy notion, you've inoculated people so that when they are then exposed to additional news about the health effects, they have already kind of rationalized that, oh, that is a matter of controversy and debate, and I don't have to think about that. I have heard that before, and so on.

They become quite settled in this notion that there is a need for additional research; that this controversy position is psychologically very appealing to someone who is addicted.

Q In other words, the habituating nature of smoking is itself a barrier to full awareness and appreciation of the hazards of smoking, at least by the confirmed smoker. The barrier cannot be surmounted if the cigarette manufacturers by their failure to disclose the dangers of smoking in their advertising and labeling permit those dangers to remain in the category of pure rumor or hearsay.

The publicity accorded the problem of smoking and health has not gone far -- has not gone so far as to implant in the minds of the consuming public actual knowledge that smoking is a substantial health hazard. What is the significance of that?

A That people who are addicted will not

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change their ways simply because of rumor or hearsay. That is, they need some more official action by government or more candid admission from the industry to kind of shake them up; that is, to break their habitual patterns.

Q Okay. Now, I have only got two more. 506, same report: Even if it is assumed -- even if it be assumed, we think contrary to fact that publicity concerning the health hazards of smoking has been so unusually widespread and intensive that it should have sufficed to bring home the dangers of smoking to everyone. Consideration must be given to the countervailing effects of the industry's consistent refusal to acknowledge the existence of such health hazards,...

Now, let me stop at that comma. What is the significance of that?

A It is a long sentence, even though you didn't even get to the end of it.

Q A long sentence.

A But the opening part essentially says that this argument that publicity is widespread, they don't accept. They think that the facts show otherwise, that knowledge of health hazards is not

widespread, and that even if it were, you still have the problem of all of this advertising activity glamorizing smoking and tending to kind of overwhelm whatever health knowledge might be out there.

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Q Following up under -- after this comma, if I can find it again. Its industry's consistent refusal to acknowledge the existence of such health hazards, its past denials of their existence, and most importantly, its long continued and massive advertising, the tendency of which is to neutralize the public awareness of the health hazards of smoking that has already been discussed.

Not only has cigarette advertising failed to disclose the dangers of smoking, it has obscured it. It is anomalous -- what does anomalous mean in this sentence?

A An anomaly, that there is an inconsistency here in what the industry is claiming.

Q It is anomalous for the industry to point to publicity concerning these dangers, which originates outside the industry and which the industry, whether intentionally or not, has endeavored in its advertising to cloud and obscure, as an excuse for the industry's failing to fulfill its obligation to make the consuming public aware of

the dangers. That is another hard sentence.

A It's another sentence.

Q What does that mean?

A In simple language they're saying that the industry should be warning the public, and the fact that the public may or may not be getting

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information from other sources does not let the industry off the hook. They still have an obligation.

Q All right. And I think this will be about the last quote here, 507, please, continuing on, if you've got it. Thanks. Moreover the simple fact that advertising for cigarettes has been and continues to be disseminated, particularly in the mass media, without any disclosure of the health hazards of smoking, breeds consumer misunderstanding of the extent to which smoking is an established, rather than merely conjecture, danger.

The members of the consuming public know that radio and television are regulated by the government and that a network of state and federal laws exist to protect them from dangerous products and unfair or misleading advertising. When they witness the continued and unrestricted dissemination of cigarette advertising on radio and television and

in other media, their natural instinctive reaction is that the danger of cigarette smoking cannot be an established fact, else government would take steps to restrict cigarette advertising, and specifically would require that such advertising include a disclosure. The record of this proceeding clearly indicates these reactions are widespread.

Now, is that -- did you understand what that meant?

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A Yes, that again, in simple language, that when people go to the store and buy a product or turn on their television sets and see a product advertised, they assume that someone in the governmental process has insured that these are safe products. And the absence of any warning and the absence of any effort to stop the advertising or to stop the sale, indicates a tolerance by the government that suggests the product, I guess, isn't all that bad.

Q Now, you have testified about cigarette advertising by the industry, including American Tobacco, and also to the TIRC and the organizations doing public relations.

And before I get to the next subject, remember we spoke about what the industry's position

was in connection with the -- rather, what its testimony was before the Labeling Act Commission in 1965. And I indicated that there was a document that we did not have with us, but let me hand this document to you, which is from the same hearings, I believe, and ask if you can identify it for us.

A This is a statement of Bowman Gray, chairman of the board of R.J. Reynolds Tobacco Company before the same hearings, 89th Congress, April 13th, 1965.

Q And are you familiar with this statement?

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A Yes. I have seen this before, and I know who Bowman Gray is.

Q I want to find the section that I am looking for. Sorry, just a minute.

MR. WILNER: I can't find it right at this second. Maybe you can help me.

Q Does Mr. Gray say in -- well, first does Mr. Gray -- I think I found it. Does Mr. Gray represent all of the manufacturers as is stated in the front of the document?

MR. RILEY: Your Honor. Your Honor, I object to the use of the testimony for the grounds stated before with respect to company statements before Congress.

THE COURT: All right. I'll overrule the objection.

Q Does Mr. Gray say that he is here as spokesman for the manufacturers of virtually all cigarettes produced in this country?

A Yes. And he goes on to name American and Brown & Williamson and others.

Q Okay. And does Mr. Gray say that there is no reason to put a warning on because everybody knows, or words to that effect?

A Yes. I believe that is one of his arguments, one of his principal arguments.

Q I just can't find it right now. I'm getting tired. Oh, well, let me come back to it

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because I'll find it.

MR. WILNER: Thank you, Stephanie. I appreciate that.

Q All right. I just have a few more things, Doctor, and then we'll find that quote. The print was kind of small. I had a hard time reading it.

Doctor, you also, I believe, have -- you have been -- or have you been asked to evaluate whether or not the TIRC and the -- and it's -- where is our chart? Thank you. Bad question. Let me start again.

The TIRC was the -- and the Hill and Knowlton -- with Hill and Knowlton being hired by it, was present roughly from what years?

A Sorry. The TIRC was active for what years?

Q Yes.

A Beginning in, essentially, 1954. January 1954 was the Frank Statement publication.

Q And did it form the Tobacco Institute as we previously read from that document in 1958?

A Yes.

Q And did it become the CTR in about 1964?

A Yes, in the early '60s. I forget the exact date.

Q Now, have you reviewed whether or not the Tobacco Institute continued to -- on the same road,

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basically, as the TIRC?

A Yes, particularly this controversy position was carried on. In fact, one still sees echoes of this form of argument to this day.

Q And has the Tobacco Institute also been instrumental in lobbying activities?

A Yes, again, active to this very day.

Q Has the Tobacco Institute, to your knowledge, opposed state bills that required

students to be educated on matters of tobacco and health?

A Yes, they did.

Q Have they opposed, to your knowledge, bills in state legislatures which have said that teachers should be instructed in cigarettes and disease before they get their teaching certificates?

A Yes, they did.

Q Have they, as a matter of course, maintained an awareness of all the state legislatures and acted accordingly?

A Yes, they have monitored legislative and regulatory activity on a state-by-state basis.

Q Now, let me hand you a document and see if you are familiar with it. Maybe we can get a copy of it, and we have a copy of it.

MR. WILNER: Help me with it.

Q It's a summary of the state legislature's activity for the TI.

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With some help I am slowly making it.

Let me -- before we get to that, Ms. Hartley was helpful enough to find the citation in the small print that I couldn't see, so let me direct your attention to it in Bowman Gray's statement to Congress. The -- let me see if we can

read it:

I do not -- We do not believe that a caution notice is necessary, either on cigarette packages or in advertising. I assume that the principal purpose of a caution notice is to alert the consumer to possible hazards associated with the use of a product.

With respect to cigarettes, however, the public has been inundated for more than a decade with reports that smoking may be injurious to health. The report of the Advisory Committee of the Surgeon General was intensively publicized in all media.

The Smoking and health issue receives continuing publicity. It's a rare day when the matter is not discussed in the daily newspaper. I doubt that any person who has read or listened has not been made aware of the contention that smoking may be injurious to the health of some persons. In these circumstances a caution notice would appear to be unnecessary.

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Is this exactly the argument that the FTC addressed?

A Yes, it is.

MR. RILEY: Your Honor, may I have a

continuing objection to the use of the statements?

THE COURT: Certainly.

MR. RILEY: Thank you.

Q And did they find that this point, that any person who has read or listened has not been aware of the contention that smoking may be injurious to the health of some persons is not definite enough knowledge upon which to base a life or death decision?

A That's correct. That is what they've dealt with in some detail, the fact that there was a contention is different from knowing it is a fact. That it may apply to some persons doesn't mean it applies to everyone. Also, there is language in here about it maybe. Well, that also implies it may not be and so on.

Q And, in fact, have you followed the statement of the tobacco industry, American Tobacco and Brown & Williamson since this date?

A I wouldn't say I followed it, but I've seen from time to time statements from them since this date.

Q Do they continue to say exactly this?

A Yes. They continue to take that kind of

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position.

MR. WILNER: Okay, did we find the -- thank you. Did we find the summary? How many copies do we have?

Q Oh, you have got a copy. Good.

Let me direct your attention to the document which I have handed -- or which I think you already have a copy of, which is dated July 7th, 1966. It's called a "Summary of State Legislative Activities."

A In here?

Q We're told it's the last tab.

A Yes, I have it.

Q Okay. Now, are you familiar with this document?

A Yes.

Q And is it a document from the Tobacco Institute?

A Well, I think it's within the Tobacco Institute. Earle Clements was the head of the Tobacco Institute, I believe, at this time.

Q And you said that you have reviewed such documents in an effort to understand how the Tobacco Institute was going about its job, so to speak?

A Yes.

Q Would you turn to page 12. And on A, 1992

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by Gallagher to education. Does it say --

MR. RILEY: Your Honor, I'm sorry to interrupt. I object to this on the basis -- same basis as stated before with respect to legislative activities.

THE COURT: All right. I'll overrule the objection, Mr. Riley.

Q All right. Now, let me back up. This -- let's go back to page 11 so we see what we're looking at. And this is 1966, I'll represent to you. Okay. And this says "New York" and above it it says what, New Jersey? Is this a state-by-state summary of what is going on in the Tobacco Institute with respect to various state bills that have been introduced?

A Yes, it is.

Q So under AR-67 by Marks, it says, Memorializes Congress -- which means, I guess, New York -- to take action with all convenient speed to require that warnings of the potential hazards of cigarette smoking be announced at an appropriate time during each television commercial and be prominently displayed on each cigarette advertising, and then copies of the resolution, et cetera, et cetera.

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A Well, I actually think that this is a proposal that the state recommend to the U.S. Congress that warnings be required in advertising. At this point in time in '66 they were on packaging only. They were not in the advertising.

Q And on page 12 under "Comment," what does the tobacco industry say -- the Tobacco Institute: The preamble of this resolution is a strong indictment of smoking as related to health. We resisted this resolution strongly, pointing out that this question of warning has been thoroughly reviewed by the Congress, et cetera, et cetera, no such restriction associated with advertising is warranted. It was further pointed out that such state restrictions were imposed -- imposed a burden on interstate commerce."

In view of that, did the tobacco industry oppose that legislation?

A Yes, they did.

Q All right. Let's look quickly then at A-1992 by Gallagher. It says, "To Education": Provides for the mandatory, quote, "instruction" regarding the dangers and effects of cigarette smoking in courses of study beyond the first eight years of full-time public day schools.

What does that mean?

A That kids in school should be taught about

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the hazards of smoking.

Q And it says, "Present status, killed in committee. Comment: The inadequacy of objective teaching materials and other objections were discussed with individual committee members."

Do you understand that as a public relations person with public relations training?

A I would call this lobbying to be more specific, or precise about the nature of the activities. It is directly influencing legislative procedures.

Q And the bill in question was to educate children?

A Yes, it was.

Q And please turn to A on page 13, A-2936 by Lyman, and this is still in New York, I guess. "To Education: Provides for instruction of all public schools in the nature and effects on the human system of smoking cigarettes, tobacco, and tobacco products. And, further, that all state teachers, colleges, and state colleges for teachers adequate time and attention shall be given to instruction in the best methods of teaching such subjects, and no

teacher shall be licensed to teach who has not passed a satisfactory examination in such subjects and the best methods of teaching them."

Well, what such subjects are they talking about?

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A Cigarettes and health.

Q "The commissioner is directed to withhold funds from any school district that does not comply. Present status: Died in the house. Comment: Opposition handled with discretion."

What does that mean?

MR. RILEY: Objection, Your Honor.

THE WITNESS: Well, it is not clear. It means they don't want --

THE COURT: Wait a minute.

MR. RILEY: Calls for speculation.

THE COURT: I'll sustain the objection.

MR. WILNER: Just one moment. Your Honor, could I have about a three-minute relaxation, not necessarily walk out, but just stand up and take time out?

THE COURT: Well, we'll send the jury into the jury room for about five minutes, then we'll see where we are at that point.

(Jury exits courtroom; discussion off

Record and recess)

(Change of reporter, 4:30 p.m.)

THE COURT: Are you ready to proceed, Mr. Wilner?

MR. WILNER: Yes, Your Honor.

THE COURT: Mr. Riley?

MR. RILEY: Yes, Your Honor.

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(Jury enters courtroom)

THE COURT: Ladies and gentlemen, we're not going to finish with this witness today, so Mr. Wilner is going to ask a few more questions for 10 or 15 minutes, then we're going to recess for the evening as far as the jury is concerned. So if you'll bear with us a little while longer.

Mr. Wilner.

MR. WILNER: Thank you, Your Honor.

BY MR. WILNER:

Q The last thing we're going to do today, Dr. Pollay, you've told us, I think, about some advertising and about things that the industry, cigarette industry did, some of the lobbying activities and some of the public relations activities and some of the others.

And my question is going to be directed to, how does all of that or did all of that affect

the ordinary consumer? And in connection with that, I wonder if you have prepared or at least assisted in preparing a chart that illustrates some of these concepts that might be helpful to the jury?

A All right.

Q Are you familiar with that?

A Yes.

Q And would that be helpful to show just how the knowledge flows, just as a --

A I think it would be.

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MR. RILEY: May I see that, Your Honor?

THE COURT: All right.

MR. WILNER: You have it. It's in your criminal negligence paper, number --

MR. NYHAN: May we be heard?

(Side-bar conference held outside the hearing of the jury)

MR. NYHAN: I want to make another objection to the fact that counsel is arguing criminal -- he just used the word "criminal negligence" in front of the jury. He's used "conspiracy," and he has had this witness utter the words, "they conspired together."

What he's doing is invading the province of the jury. He's coloring all of this with

inadmissible argument. It's prejudicial. We request that you direct him to stop making these prejudicial comments in front of the jury concerning ultimate issues in the case. He's just used the word "criminal negligence." The witness used the word --

THE COURT: Not so loud.

MR. NYHAN: I'm sorry.

MR. WILNER: I told counsel that this document was in his paper entitled criminal negligence. That's the paper that I gave to Your Honor and the paper that he has. I don't know what

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he's worried about.

MR. NYHAN: I object to this argumentative headline, "Effective Industry Fraud and Misrepresentation on Consumer Expectations of Safety of Cigarettes. That's the question this jury is asked to decide. It's not fair to let him put up these argumentative summaries of his closing arguments on this exhibit. And whether the witness participated in concocting this argument isn't relative.

MR. WILNER: Your Honor, I hate to make this point, but the hour is late. I'm frail, and now I'm being double-teamed by two people who I

thought -- I don't know who's handling this witness. But Your Honor's --

THE COURT: Let's do this. Let's let the jury go home. We'll go back, we'll argue all of that. Put anything you want on the record, I'll make a ruling, and we'll go on. All right?

MR. WILNER: Okay.

THE COURT: I think it's late for everybody. Mr. Wilner, 9:00 is all right in the morning?

MR. WILNER: Yes, Your Honor.

(Side-bar conference concluded; proceedings resumed before the jury)

THE COURT: All right. Ladies and gentlemen, I'm going to go ahead and release you for

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the evening. Please do not discuss the case among yourselves or anyone else. And if you're in the jury room at 9:00, we should be able to start right at 9:00. And, again, the attorneys and I are going to stay and do some work. The jury is excused until 9:00 tomorrow morning. I'll see the attorneys in my chambers in about five minutes.

MR. BACKER: Court is recessed until tomorrow morning at 9:00.

(Jury exits courtroom)

(Proceedings in chambers with the following persons present: Mr. Nyhan, Mr. Riley, Mr. Jarmel, Ms. Terry, Mr. Browning, Mr. Wilner, Ms. Hartley, and Mr. Acosta.)

THE COURT: All right. Are you ready?

MR. WILNER: I don't know. I don't know. Are we going to argue pub today or is there --

MR. JARMEL: Judge, we have a problem with arguing B & W Pub. And I don't mean to sound like a broken record, but we did have ten binders on the table. We had no idea that this was going to come up. I thought we were arguing Tucker, Wigand, Lebow, Weigold. And I've asked Stephanie every day what are the privilege documents coming up tomorrow, and she said she can't tell me, be prepared to argue everything.

I don't know if Jackie can argue the

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nonprivileged documents, but I literally do not have my objections to the privileged stuff. Jackie can speak to whether she can handle the nonprivileged stuff. We can do it in the morning. I'm not trying to be obstructive; I didn't know that was coming up.

THE COURT: I don't have a problem with doing it in the morning.

MR. WILNER: It's okay with us. I think

Stephanie is having a cow, but it's all right. I think that we're all going to be tired -- we're all tired now, but I'm willing to do it, but it's okay. I think that for the Court's -- if we're ever going to get through this trial, we've got to try and resolve as many things without having a ruling on every one as we can. We're willing to concede and you're willing to concede on certain issues, and we're willing to concede on certain issues, so we're going to try to do that.

THE COURT: Well, I have -- you know, so far it's working, because when we give you that time they come back and there's very little that you-all are arguing over.

MR. WILNER: That's what I want to continue, so no problem.

THE COURT: But we need to set a time to do that. I don't want the jury sitting there, that's the only thing. I'll come in as early as you-all want.

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MR. JARMEL: Do you want to argue B & W pub tomorrow or is this a rolling thing?

MR. WILNER: We're doing the best we can.

THE COURT: You need to put it in tomorrow?

MR. WILNER: Yes, we need to put it in tomorrow. On that, I will be happy to clip off the top that says what it is, you know. It says "fraud" and "misrepresentation," no problem. Cut it off.

THE COURT: I had, frankly, some problem with the other chart saying that.

MR. WILNER: We'll cut it off.

THE COURT: And I do have a problem with that, Mr. Nyhan, whether you argue it or Mr. Riley argues it, I still have a problem.

MR. WILNER: We'll clip it right off.

THE COURT: I think you can show the connections.

MR. WILNER: Right.

THE COURT: And have him testify to the connections, but -- and you can certainly argue that those connections show a conspiracy, but I don't think you ought to do that on the chart and have them look at it every time you put it up.

MR. WILNER: Just so that Your Honor's ruling is clear, if I cut off my "estimated effect of" we're okay?

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THE COURT: Well, let me see it.

MR. NYHAN: Your Honor, could I list my objections and then you can rule on them?

THE COURT: All right.

MR. NYHAN: If I may see the copy again. We object to the headline, "Effective Industry Fraud and Misrepresentation."

THE COURT: Okay, the headline is gone.

MR. WILNER: We agreed to that.

MR. NYHAN: We also object to the box "industry conspiracy and fraud." Again, conspiracy is one of the theories alleged in the complaint, although --

MR. WILNER: Okay, that's fine.

THE COURT: I think I would do away with that.

MR. WILNER: That's fine.

MR. NYHAN: And then "scientific fraud" as well. That fraud also is one of the theories that Mr. Wilner argued in his opening argument when he discussed the verdict form. So I think those words that point to the verdict form or otherwise, it's pure argument at this point.

MR. WILNER: All right. We'll concede in the interest of moving it along. I'll take out the words "fraud" and "conspiracy" and then submit it to Your Honor before.

MR. NYHAN: So we're all on the same page,

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remove the top.

MR. WILNER: That gets out.

THE COURT: That's gone.

MR. WILNER: That's gone.

THE COURT: And at least, you know, you can say scientific something else.

MR. WILNER: I'll put another thing in there and I'll show it to you before.

MR. NYHAN: And on this other chart, I'd appreciate it if you'd take the word "conspiracy" off.

MR. WILNER: All right. We will before -- if we show it again, we'll take it off.

THE COURT: All right. What else? What about Mr. Tucker? Do you have the --

MR. JARMEL: I'm ready to argue this now, or if we wanted to argue tomorrow, that's fine.

THE COURT: That's all right. I didn't mean to cut you off.

MS. HARTLEY: Your Honor, I thought we had made quite a bit of progress today on resolving some of the issues in Tucker. And just before we started, Mr. Jarmel said that we could perhaps talk tonight and resolve even more of Tucker.

THE COURT: That's all right. I just

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don't want to hold the jury up tomorrow. I can be here at 8:00 if that's plenty of time. I've got an 8:30 to 9 hearing, but I can even tell them that they can come back some other time. It's a hearing that I have to handle. It's a hearing that Judge Nachman had the other day that's like a rehearing on an order that I've already ruled on, so I have to do it; but I can probably tell them to come back at lunch.

MR. WILNER: How much are we talking about?

MR. NYHAN: You want to do it at lunch tomorrow?

MR. WILNER: Yes, we can do it at lunch. I don't think we're talking about that much with Tucker really.

THE COURT: I'm at your disposal. I just don't want to do it while the jury is sitting there.

MR. WILNER: No, I understand. I think the first item of business will be pub, because that concerns this witness. Once we had this witness, we kept rolling over on Tucker.

THE COURT: That keeps getting put off.

MR. WILNER: We have to do what's important. If we can know how many contested

documents there are in pub, we may withdraw some of

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them in the interest of, you know, moving it along, depending on how many are objectable. Why don't we meet at 8:00, and we may be able to tell Your Honor we've agreed and we can go out.

THE COURT: That is fine, 8:00 tomorrow.

MR. JARMEL: Judge, one other thing on Tucker. Ms. Hartley and I will obviously try to work to narrow the range of our textural differences. We will, obviously, maintain an objection to the deposition as a whole. We just wanted to let you know that the doctor, Dr. Williams, is available to talk on the phone if you would consider that as being helpful and probative of his condition.

THE COURT: Well, if you have designated questions and answers in his deposition that you want me to read overnight and be prepared and then discuss tomorrow morning, I'd be glad to do that, but so far I think what I said this morning still holds that if you can show me where his questions and answers are -- where he's confused from the questions and answers, I don't have a problem with what you argued this morning so much except that in reading it, I don't see where he's all that confused

in the portion that they want to read.

Now, still I'm not saying that all of those questions and answers would be admissible.

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There may be other portions which I have not read -- and I've read every portion that they designated and that you know that they have designated.

And I've read in the beginning of his deposition, I had taken it home and read about 60 or 70 pages, from 1 through 60 or 70, and I was not impressed that his -- that he was confused or plainly confused on the deposition.

Now, I think I would be very impressed if you could show me that he gave absolute answers to questions which were absolutely wrong, you know. So, I mean, that would tend to back up what the doctor says that he's liable to, in his opinion, give you whatever answer -- give you an answer whether he knows it or not to be true.

And that, the allegation or the assertion on your part, does concern me. But I don't see it in the deposition. If you want me to read certain portions of it that will show me that, I'll be glad to do that.

MR. JARMEL: We'll do that, Your Honor.

THE COURT: That's all --

MR. JARMEL: I understand. I just wanted you to know that the doctor was available.

THE COURT: Okay.

MR. NYHAN: Judge, could I add one more item of this, first the conspiracy chart that was shown. We would like to use this tomorrow. We'd

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like to have a copy without "conspiracy" and without "scientific fraud" in here and without the colors and ask that that be made available.

MR. WILNER: Okay. No problem.

THE COURT: You'll give him a copy of the end product?

MR. WILNER: Absolutely.

MR. NYHAN: Thank you.

MR. WILNER: Thank you, Your Honor.

THE COURT: Off the record now.

(The proceedings were adjourned at 5:00 p.m.)

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